(16,798.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 244.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL., APPELLANTS,

vs.

HENRY W. BEHLMER.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 23, 1898.

a UNITED STATES OF AMERICA, ss:

At a United States circuit court of appeals for the fourth circuit, begun and held at the court-house, in the city of Richmond, on the first Tuesday of November, being the second day of the same month, in the year of our Lord one thousand eight hundred and ninety-seven—present, Hon. Nathan Goff, circuit judge; Hon. Charles H. Simonton, circuit judge; Hon. William H. Brawley, district judge—among other were the following proceedings, to wit:

HENRY W. BEHLMER, Appellant,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY and Other Railroads, Appellees. } No. 173.

Appeal from the circuit court of the United States for the district of South Carolina, Charleston.

Be it remembered that heretofore, to wit, on the 20th day of April, 1896, transcript of the record in the above-entitled cause was transmitted to and filed in our said circuit court of appeals here, which is as follows, to wit:

b *Transcript of Record.*

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court. In Equity.

HENRY W. BEHLMER, Plaintiff, Appellant,
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL., Appellees.

At a circuit court of the United States for the fourth circuit, in and for the district of South Carolina, begun and holden at Columbia, in the district aforesaid, on the fourth Monday in November, 1894, and at various terms subsequent thereto, before the Honorable Charles H. Simonton, one of the judges of said court for the district of South Carolina, holding said circuit court according to the form of the act of Congress in such cases made and provided, the following proceedings were had in equity:

Be it remembered, that heretofore, to wit: on the 2nd day of November, 1894, H. W. Behlmer, complainant, impleaded The Louisville and Nashville Railroad Company *et al.*, defendants, in a bill of complaint, which bill is in the words and tenor following:

1 THE UNITED STATES OF AMERICA:

In the Circuit Court, Fourth Circuit, Eastern District of South Carolina.

H. W. BEHLMER, Plaintiff,

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY and THE Central Railroad and Banking Company of Georgia and H. M. Comer, Its Receiver, as Lessees of the Georgia Railroad; The Memphis and Charleston Railroad Company, The East Tennessee, Virginia and Georgia Railway Company, and Samuel Spencer, Henry Fink, and Charles M. McGhee, as Receivers of said Last Two Mentioned Roads, and The Southern Railway Company, the Purchaser, Assignee, and Successor of said East Tennessee, Virginia and Georgia Railway Company, and The South Carolina Railway Company and Its Receiver, Daniel H. Chamberlain, and The South Carolina and Georgia Railroad Company, the Purchaser, Assignee, and Successor of the Same.

To the circuit court of the United States, sitting in equity within and for the eastern district of South Carolina:

1. Your petitioner, H. W. Behlmer, a citizen and resident of the town of Summerville, South Carolina, humbly complaining, showeth to this honorable court that the Louisville and Nashville Railroad Company is a corporation created, chartered and existing under and by virtue of the laws of the State of Kentucky, having its principal office at Louisville, in the State of Kentucky; that the Central Railroad and Banking Company of Georgia is a corporation created, chartered and existing under and by virtue of the laws of the State of Georgia, having its principal office in the city of Savannah, Georgia, and H. M. Comer has been duly appointed by a competent court as receiver of said last-mentioned company, and is now and has for more than six months last past been its receiver, and as your petitioner is informed and believes, R. Somers Hayes has lately been associated as co-receiver of the said The Central Railroad and Banking Company of Georgia; that the Georgia Railroad Company is operated in the State of Georgia under the name of the "Georgia Railroad Company," with its principal office at Augusta, in the State of Georgia; and the above-named The Central Railroad and Banking Company of Georgia, and The Louisville and Nashville Railroad Company, are the lessees of the said The Georgia Railroad Company; that the East Tennessee, Virginia and Georgia Railway Company is a corporation created, chartered, and existing under and by virtue of the laws of the State of Tennessee, having its principal office at Knoxville, in the said State of Tennessee, and

2 that Samuel Spencer, Charles M. McGhee and Henry Fink were duly appointed the receivers of the said East Tennessee, Virginia and Georgia Railway Company; and that the Southern Railway Company, a corporation created, chartered, and existing under and by virtue of the laws of the State of ——, having its prin-

cipal office at Washington, the District of Columbia, now, as your petitioner is informed and believes, owns, controls and operates the railways formerly operated by the said East Tennessee, Virginia and Georgia Railway Company; that the Memphis and Charleston Railroad Company is a corporation created, chartered, and existing under and by virtue of the laws of ——, and that Samuel Spencer, Henry Fink and Charles M. McGhee, of the city and State of New York, are now and for more than six months last past have been the receivers of said corporation, controlling and operating the same; that the South Carolina Railway Company is a corporation created, chartered, and existing under and by virtue of the laws of the State of South Carolina, having its principal office at Charleston, in the State of South Carolina, and that D. H. Chamberlain is now and for more than six months last past has been the receiver of the said The South Carolina Railway Company, and that, as your petitioner is informed and believes, the South Carolina and Georgia Railroad Company, a corporation created, chartered, and existing under and by virtue of the laws of South Carolina, does now own, control and operate the railways formerly operated by the said The South Carolina Railway Company; and that each of the said above-described corporations and persons, defendants herein, was on the — day of December, 1892, or has since become, a common carrier, engaged in the transportation of passengers and property wholly by railroad, by itself, or together with some one or more or all of the said other above-named defendants, between points in different States of the United States, and particularly from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, and as such common carriers, so engaged in transportation as aforesaid, the said corporations and persons, defendants herein, were at the time aforesaid, have been since, and now are subject to the provisions of an act of Congress of the United States, entitled "An act to regulate commerce," approved February 4, 1887, as amended by acts approved March 2, 1889, and February 10, 1891, and supplemented by an act approved February 11, 1893.

2. That each of the said above-described corporations and persons, defendants herein, *and* were heretofore, to wit: on the — day of December, 1892, duly impleaded with other common carriers, in a controversy, not requiring a trial by jury, as provided for in the seventh amendment to the Constitution of the United States, before the Interstate Commerce Commission, upon the petition of H. W. Behlmer, for alleged violations on the part of the said defendants, of the provisions of the said "act to regulate commerce," as more fully and at large appears in and by the said petition on file in the office of the said commission, and by a true copy thereof hereunto annexed and made a part of this petition, the same being marked Exhibit A.

3 3. That thereafterwards and forthwith copies of the said above-described petition were duly served upon the defendants named therein with full and timely notice to satisfy the same or make answer thereto.

4. That thereafterwards answers to the said petition of H. W. Behl-

mer were filed with the said commission by defendants named in said petition, to wit: by the Louisville and Nashville Railroad Company, and the Central Railroad and Banking Company, and Charles M. McGhee and Henry Fink, receivers of the Memphis and Charleston Railroad Company, and the East Tennessee, Virginia and Georgia Railway Company, and by Daniel H. Chamberlain, receiver of the South Carolina Railway Company, as more fully and at large appears in and by the said answers, on file in the office of the said commission and by true copies thereof hereunto annexed in consecutive order, as above set forth, and hereby made a part of this petition, the same being marked Exhibit B.

5. That thereafterwards, the said causes being at issue upon the pleadings as aforesaid, were duly and regularly brought on for hearing and investigation before the said Interstate Commerce Commission, duly and legally assembled for that purpose, at the city of Charleston, in the State of South Carolina, on the 4th day of April, 1893, when the said H. W. Behlmer, as well as the said defendants, duly appeared, by their officers and attorneys.

6. That during the said hearing and investigation it was made to appear to the satisfaction of the said commission that the said defendants had violated the provisions of the said "act to regulate commerce," in certain respects, as was stated to have been violated by them in the said petitions of Behlmer hereinabove described and made a part hereof; and thereupon, on the 27th day of June, 1894, the said commission duly and legally determined the matters and things drawn in controversy and at issue between the said parties, and made a full report in writing of its findings of fact in respect of such matters and things in controversy and at issue in said causes, and of its conclusions based upon such findings of fact, as will more fully and at large appear in and by the said report of findings and conclusions in said causes on file and of record in the office of the said commission, and by a true copy thereof hereunto annexed and made a part of this petition, the same being marked Exhibit C.

7. That thereafterwards and forthwith upon the determination of the said causes as aforesaid, the said commission duly made and entered a lawful order and notice, based upon the said findings of fact and conclusions of the commission, as set forth in its said report hereinbefore referred to and made a part hereof, agreeably to the provisions of the statute in such cases made and provided, as will more fully and at large appear in and by said order and notice now on file and of record in the office of the said commission, and a true copy thereof hereunto annexed and made a part of this petition, the same being marked Exhibit D.

8. That thereafterwards the said commission did, as required by law, cause a properly authenticated copy of its said report of
4 findings of fact and conclusions in said causes, together with a copy of the order and notice aforesaid to be delivered to each and all of the parties to said cause, their receivers and successors in operation; and that notwithstanding the said commission has established and promulgated rules of practice in cases and proceed-

ings before it, whereby, as set forth in rule XV thereof, suitable provision is made for the showing of error or of newly discovered material evidence by parties against whom an adverse report and order has been made by the commission, and the granting of rehearing upon such showing, if sufficient, none of the defendants in said cause, their receivers or their successors in operation, has filed or presented to said commission an application or petition for the rehearing of said cause, nor has any of said defendants, their receivers or successors in operation, moved in any form or taken any steps whatsoever to vacate, set aside, alter, modify, or change said findings of fact or conclusions or said order and notice, and neither the said findings, conclusions, or order and notice, nor any part thereof, have been vacated, set aside, altered, modified, or changed in any respect whatsoever.

9. That thereupon your petitioner, H. W. Behlmer, shows that after the aforesaid date, when said report and findings of fact and conclusions of the said commission *was* filed, and its order was made and entered as aforesaid, and on and prior and after the days that the said report and said order and notice were caused to be delivered to the parties to said cause, the said defendants in said cause, their receivers or their successors, did have, publish, keep in effect, and charge certain rates for the transportation of the kinds or classes of freight mentioned in said report and order between the points mentioned and referred to in said report and order, which charges were and are the same complained of in said cause, to wit: 28 cents per hundred on hay from Memphis to Summerville, over the roads of defendants herein, who are common carriers, under a common control, management or arrangement, for continuous carriage or shipment, and are engaged in the transportation of passengers and property, wholly by railroad, between points in the States of Tennessee and South Carolina, over the same line in the same direction, and under substantially similar circumstances, the charges for the shorter haul being greater than that for the longer, although the shorter distance was and is included in the longer distance.

10. That the charge maintained from Memphis to Charleston is 19 cents per hundred on hay, while that to Summerville is 28 cents per hundred, the same being made up of the through rate of 19 cents to Charleston, plus 9 cents local to Summerville, the aggregate being unreasonable and oppressive.

11. That the defendants herein have established and now maintain the said rates which they were by said order and notice of the commission duly notified and required to wholly cease and desist on or before the 15th day of July, 1894, and thenceforth abstain from charging, demanding, collecting or receiving; whereby the defendants herein, and each of them, did willfully violate, disobey, disregard, and wholly neglect and refuse to comply with the provisions and requirements of the said order of the commission, and said defendants have continued, and do still continue, to willfully violate, disobey, disregard, and wholly neglect and refuse to comply with the provisions of said order, and each

and every requirement thereof, at Summerville, in the State of South Carolina, and at many other points on the several lines or roads operated by said defendants herein.

Wherefore the petitioner prays:

1. That upon the statements hereinbefore embodied and set forth an order be entered granting to the petitioner a writ of injunction or other proper process, to run during the pendency of this cause, restraining defendants herein, their officers, servants and attorneys from continuing in their violations of and disobedience to said order of the commission.

2. That each of the defendants herein, be given such short notice of this proceeding, and to severally appear herein, as the court shall deem reasonable; that such notice be issued and served upon them, their officers, agents, or servants, in such manner as the court shall direct, and that the court will, at a time and place to be stated in said notice, proceed to hear and determine this matter as a court of equity, verification of any answers that may be filed herein by said defendants, or any of them, being hereby specially waived; and that the court will so order that the formal pleadings and proceedings applicable to ordinary suits in equity shall be dispensed with, and that the findings of fact set forth in the said report of the commission shall in all respects be *prima facie* evidence of the matters therein stated, and so order that this matter shall proceed to speedy hearing and determination.

3. That upon such determination an order, decree, writ of injunction, or other proper process may be issued, restraining the said defendants, and each of them, and their officers, servants, and attorneys, from further violating or disobeying the requirements of said order of the commission, and enjoining perpetual obedience to the same; and further requiring each of the said defendants to pay into court, or in such other manner as the court may direct, such sum of money, not exceeding the sum of five hundred dollars, for every day, after a day to be named therein, that they or any of them shall fail to obey the said order, decree, injunction, or other proper process.

4. That the court order, decree and adjudge the payment by defendants of such costs and counsel fees as may be deemed reasonable.

5. For such other and further relief in the premises as to the court may seem meet and the petitioner's cause may require.

CLAUDIAN B. NORTHOP,
Solicitor for Petitioner.

6 UNITED STATES OF AMERICA, }
State of South Carolina, Eastern District. }

Personally appeared before me, H. W. Behlmer, who on oath says that he is the petitioner in the above cause, and that the allegations contained in the foregoing petition are true to the best of his knowledge and belief.

H. W. BEHLMER.

Sworn to before me this 2d day of November, 1894.

C. J. MURPHY,

[SEAL.] *C. C. C. U. S., District of S. C.*

Before the Interstate Commerce Commission.

H. W. BEHLMER
vs.
THE MEMPHIS AND CHARLESTON RAILROAD COMPANY, THE EAST Tennessee, Virginia and Georgia Railway Company, The Georgia Railroad and Banking Company, The South Carolina Railway Company, Henry Fink and Charles M. McGhee, as Receivers of the East Tennessee, Virginia and Georgia Railway Company and the Memphis and Charleston Railroad Company; Daniel H. Chamberlain, as Receiver of the South Carolina Railway Company; The Central Railroad and Banking Company of Georgia, and The Louisville and Nashville Railroad Company, as Lessees of the Georgia Railroad, and H. M. Comer, as Receiver of the Central Railroad and Banking Company of Georgia.

Petition.

To the honorable the Interstate Commerce Commission:

The petition of H. W. Behlmer, whose address is Summerville, South Carolina, on behalf of himself and many other merchants and residents of said place, respectfully shows:

First. That Summerville is an incorporated town of considerable size and importance, situate on the South Carolina railway, in the State of South Carolina, and distant 22 miles inland from Charleston, South Carolina.

Second. That your petitioner carries on a wholsale hay and grain business in said town, and is thus 22 miles nearer than Charleston to western points, where grain shipments originate.

Third. That on the 17th day of August, 1892, he received at Summerville, South Carolina, two car-loads of hay, which through his agents, F. D. C. Kracke's Sons, he had ordered from Memphis, Tennessee.

Fourth. That said two car-loads of hay were carried from Memphis, Tennessee, to Chattanooga, Tennessee, 310 miles, by
7 and over the lines of the Memphis and Charleston railroad; from Chattanooga, Tennessee, to Atlanta, Georgia, 152 miles, by and over the lines of the East Tennessee, Virginia and Georgia railroad; from Atlanta, Georgia, to Augusta, Georgia, 171 miles, by and over the lines of the Georgia railroad; and from Augusta, Georgia, to Summerville, South Carolina, 115 miles, by and over the lines of the South Carolina Railway Company. That these defendants are common carriers under a common control, management or arrangement, for continuous carriage or shipment, and are engaged in the transportation of passengers and property wholly by railroad between the points above mentioned.

Fifth. That said two car-loads of hay were hauled from Memphis

Tennessee, to Summerville, South Carolina, over the same line, in the same direction as Charleston, South Carolina, and under substantially similar circumstances and conditions as Charleston traffic. That the haul from Memphis to Summerville was and is 22 miles shorter than the haul from Memphis to Charleston, and the said shorter distance was and is included within the longer distance.

Sixth. That your petitioner was forced to pay 28 cents per hundred pounds on said shipment of hay to Summerville, the shorter distance, whereas the rate to Charleston, the longer distance, was and is 19 cents per hundred pounds.

Seventh. That your petitioner was thus obliged to pay $56 in the aggregate as freight on these two car-loads of hay from Memphis to Summerville, whereas the same shipment would have been made by the same roads, over the same rails, in the same direction, to Charleston, a greater distance of 22 miles, for a less sum, that is $38 in the aggregate.

Eighth. That this was and is in violation of the fourth section of the act of Congress, passed February 4th, 1887, entitled An act to regulate commerce, which provides: "That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of the like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance."

Ninth. For a further complaint, your petitioner alleges, that he is informed and believes, that the additional 9 cents per hundred which he is forced to pay, is a so-called local rate from Charleston to Summerville, a distance of 22 miles, whereas the through rate from Memphis to Charleston is 19 cents per hundred, the distance being 771 miles. That said local rate is imposed by the South Carolina Railway Company, or its receiver, who now operates the road, or by the Southern Railway and Steamship Association.

Tenth. Your petitioner alleges that on its face this so-called local rate of 9 cents per hundred for 22 miles, is excessive and
8 unreasonable, and the aggregate charge of 28 cents per hundred from Memphis to Summerville is excessive and unreasonable, and in violation of section 1 of the act of Congress of February 4th, 1887, entitled An act to regulate commerce, which provides:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Eleventh. Your petitioner alleges that all the companies and rail-

roads over which said two car-loads of hay were hauled, are duly incorporated under the laws of the United States and the several States in which they do business, and that each and every one of them is a common corrier, subject to the terms of the act of Congress aforesaid, together with its amendment.

Twelfth. That the South Carolina Railway Company is in the hands of a receiver, to wit: Daniel H. Chamberlain, who was duly appointed as such by a competent court, previous to August 17th, 1892, at which time he was running and managing said railway, and still continues to do so. His address is Charleston, South Carolina, where he resides.

Thirteenth. That the East Tennessee, Virginia and Georgia railroad, including the Memphis and Charleston railroad, is also in the hands of receivers, to wit: Henry Fink and Charles M. McGhee, who have been duly appointed as such by a competent court. Their addresses are Knoxville, Tennessee, where they reside.

Fourteenth. The Georgia railroad is operated under a joint lease to the Louisville and Nashville Railroad Company and the Central Railroad and Banking Company of Georgia, which last-named company is in the hands of H. M. Comer, its duly appointed receiver.

Fifteenth. That all the above-mentioned lines are members of the Southern Railway and Steamship Association, and that the discrimination and excessive rates against Summerville exist not only on hay, as above set forth, but on all articles of interstate commerce coming to that place, much to the detriment and disadvantage of the town and the business of its merchants.

Wherefore your petitioner, on behalf of himself and many others, prays that a notice issue to said railroads to cease and desist from violations of the law as above set forth, and all similar violations, and for such other and further order as the commission may deem necessary in the premises.

CLAUDIAN B. NORTHROP,
Attorney for Behlmer and Others,
11 *Broad St., Charleston, South Carolina.*

9 UNITED STATES OF AMERICA, }
Fourth Circuit, District of South Carolina, } ss:

Personally appeared before me, C. J. Murphy, deputy clerk of the circuit court of the United States for the fourth circuit, district of South Carolina, H. W. Behlmer, who, on oath, says that the allegations of the foregoing petition are true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes them to be true.

Sworn to before me this 29th day of December, 1892.

[SEAL.]

C. J. MURPHY,
Deputy C. C. C., U. S. Dist. Court.

Joint Answer of the Louisville and Nashville Railroad Co. and the Central Railroad and Banking Co.

Before the Interstate Commerce Commission.

H. W. BEHLMER
vs.
THE MEMPHIS AND CHARLESTON RAILROAD COMPANY ET AL.

The joint and several answer of the Louisville and Nashville Railroad Company and the Central Railroad and Banking Company.

These respondents say:

1. They are complained of in this complaint as the lessees of the Georgia railroad, which is one of the railroads over which was transported the property to which the complaint refers.

These respondents are jointly the assignees of a lease of said railroad, made by the Georgia Railroad and Banking Company to William M. Wadley, which railroad they operate under the adopted name of the "Georgia Railroad Company;" but there is no such corporation as the "Georgia Railroad Company."

2. Respondents admit that at the time of the committing of the acts complained of in the petition, said Georgia Railroad Company and the defendants, The Memphis and Charleston Railroad Company and The East Tennessee, Virginia and Georgia Railroad Company and The South Carolina Railway Company, were severally engaged in the transportation of persons and property by their said several lines of railroad, from Memphis, in the State of Tennessee, thence through the States of Tennessee, Alabama, Georgia and South Carolina, to Charleston, in said last-named State. They had an agreement or arrangement with said named carriers for the continuous carriage or shipment of through freight from Memphis to Charleston at certain agreed through rates, but they were under no common control or management.

3. Respondents admit that Summerville is a town on the line of the South Carolina railway, and is twenty-two miles inland from Charleston. Respondents presume that it is true that two car-
10 loads of hay were received by petitioner at Summerville from Memphis on or about August 17, 1892, and that they were carried over the Memphis and Charleston railroad from Memphis, Tennessee, to Chattanooga, Tennessee, a distance of three hundred and ten miles; over the East Tennessee, Virginia and Georgia railroad from Chattanooga, Tennessee, to Atlanta, Georgia, a distance of one hundred and seventy-one miles; over the South Carolina railway from Augusta to Summerville, a distance of one hundred and fifteen miles. And respondents admit that said railroads are common carriers, and are engaged in the transportation of passengers wholly by railroad between points in the States of Tennessee and South Carolina.

4. Respondents admit the haul from Memphis to Summerville is

twenty-two miles shorter than the haul from Memphis to Charleston, and that said shorter distance is included in the longer distance.

5. Respondents admit that a greater compensation in the aggregate was received for the transportation of said two car-loads of hay from Memphis to Summerville, than would have been charged for the same if they had been transported to Charleston.

6. Respondents deny that the aggregate charge of twenty eight cents per hundred from Memphis to Summerville is excessive and unreasonable and in violation of section IV of the act of Congress of February 4th, 1887, entitled An act to regulate commerce.

7. Respondents deny that the acts complained of in the petition are in violation of the fourth section of the aforesaid act; for the following reasons: to wit:

1. The Georgia Railroad Company and the other carriers complained against have no joint through tariff from Memphis to Summerville, and therefore they have no "line" in the sense of said section from Memphis to Summerville, on which said section can operate.

2. The transportation of two car-loads of hay from Memphis to Summerville is not done under substantially similar circumstances and conditions as the transportation of like property from Memphis to Charleston.

For (first) Summerville is a local station on the South Carolina railway. It is not on any water route, and enterprise and capital have not constructed more than one railroad to it. It has not, therefore, the advantage of competition of carriers. The one railroad, on which it is located, viz: the South Carolina Railway Company is not compelled by competition to choose between a reasonable rate and a rate which is much below what would be reasonable. On the other hand, at Charleston there exists competition with numerous all-rail routes between Memphis and Charleston. Respondents here mention eight of these all-rail routes between Memphis and Charleston, to wit:

Memphis and Charleston railroad; East Tennessee, Virginia and Georgia railroad; Savannah, Florida and Western railway, and Charleston and Savannah railway.

Memphis and Charleston; Western and Atlantic; Central
11 Railroad and Banking Company of Georgia; Port Royal and Augusta, and Charleston and Savannah.

Memphis and Charleston; Western and Atlantic, East Tennessee, Virginia and Georgia or Central Railroad and Banking Company of Georgia; Seaboard air line; Clinton, Newberry and Laurens, and the Atlantic coast line.

Kansas City, Memphis and Birmingham; Central Railroad and Banking Company of Georgia; Port Royal and Augusta and Charleston and Savannah.

Kansas City, Memphis and Birmingham; Georgia Pacific; Richmond and Danville, and Atlantic coast line.

Kansas City, Memphis and Birmingham; Louisville and Nashville; Alabama Midland; Savannah, Florida and Western, and Charleston and Savannah.

Louisville and Nashville; Nashville, Chattanooga and St. Louis; Western and Atlantic; Georgia railroad, and South Carolina railway.

Louisville and Nashville; Nashville, Chattanooga and St. Louis; Western and Atlantic; Seaboard air line, and Atlantic coast line or Port Royal and Western Carolina; Port Royal and Augusta, and Charleston and Savannah railroads.

Besides these eight all-rail routes there are others, which could be designated. These lines are not only potential but are actual competitors with these respondents and their codefendants, for business from Memphis to Charleston.

(Second.) Charleston is a port on the Atlantic coast, accessible and easily reached from the ports of Baltimore, Philadelphia, New York, Boston and other eastern ports, from which hay is shipped by water. If the rail lines from Memphis to Charleston charged rates to Charleston as high as the rate to Summerville, although the latter rate is in itself reasonable, no hay would be brought from Memphis to Charleston, but Charleston would be supplied with hay from North Atlantic ports and the railroads would lose the hay business and Memphis would lose a hay market.

(Third.) The rates on western produce to Charleston and other coast cities, such as Savannah, Port Royal and Brunswick, are made a view to actual, existing water competition. Western produce such as grain, hay, etc., distributed from Chicago, can reach Charleston through the ports of New York, Philadelphia, and Baltimore, over continuous water routes via the lakes and canal, or over combined rail and water routes.

The all-rail lines, seeking to do business between Chicago and Charleston and other coast cities, are compelled to make their rates approximate those which are offered by the continuous water route or by the combined rail and water routes. The all-rail routes make their rates as much higher as the difference in service will permit, and those rates are correspondingly adjusted from all western points, such as Evansville, Cairo, St. Louis, Memphis, etc. At present the all-rail rate from Chicago to Charleston on hay, for instance, is 33c. per 100 lbs.; from St. Louis, 28c.; from Louisville, Evansville
12 and Cairo, 23c.; and from Memphis, 19c.—the route through Memphis offering facilities for the transportation of hay, grain and western products generally, from the States of Missouri, Kansas, Nebraska, etc.

The rate from Memphis to Charleston on hay is, therefore, forced upon the defendant lines by actual existing water competition and other competition beyond the control of defendant.

The controlling element in said competition is the lake, canal and ocean transportation between Chicago and Charleston; or the lake transportation from Chicago to Buffalo, or other lake port, thence by rail to New York, thence by ocean to Charleston; or rail transportation from Chicago to Baltimore, Philadelphia or New York, thence by ocean to Charleston.

(Fourth.) As above stated, the Georgia Railroad Company, and the other carriers complained against, have no joint through tariffs

from Memphis to Summerville. They do have oint through tariffs from Memphis to Charleston, and the joint through rate from Memphis to Charleston on hay is 19c. per 100 lbs.

Respondent's information and belief is, that the defendant, The South Carolina Railway Company or its receiver, charges a local rate of 9c. per 100 lbs. on hay between Charleston and Summerville, which added to the 19c. per 100 lbs. from Memphis to Charleston makes the total combined through and local rate Memphis to Summerville 28c. per 100 lbs. on hay.

Respondent's information and belief is, that said local rate of 9c. per 100 lbs., charged by the South Carolina Railway Company or its receiver, between Charleston and Summerville is just and reasonable.

JOS. B. CUMMING,
Respondent's Solicitor.

STATE OF GEORGIA, }
Richmond County. }

You, John W. Green, do swear, that you are the general manager of the Georgia Railroad Company, and that the facts set out in the foregoing answer, so far as they are stated of your own knowledge are true, and so far as they are stated on information and belief you believe them to be true. So help you God.

(Signed) JNO. W. GREEN.

Sworn to and subscribed before me, this 25th day of March, 1893.

WM. LYON MARTIN,
[SEAL.] *Notary Public, Richmond County, Georgia.*

13 *Answer of D. H. Chamberlain, Receiver.*

Before the Interstate Commerce Commission.

H. W. BEHLMER
vs.
THE MEMPHIS AND CHARLESTON RAILROAD COMPANY ET AL.

Answer of D. H. Chamberlain, receiver of the South Carolina Railway Company.

This respondent says:

1. Respondent admits that Summerville is a town on the line of the South Carolina railway, and is twenty-two miles inland from Charleston. Respondent admits that it is true that two car-loads of hay were received by petitioner at Summerville from Memphis, on or about August 17, 1892; and that they were carried over the Memphis and Charleston railroad from Memphis, Tennessee, to Chattanooga, Tennessee, a distance of three hundred and ten miles; over the East Tennessee, Virginia and Georgia railroad from Chattanooga, Tennessee, to Atlanta, Georgia, a distance of one hundred and fifty-two miles; over the Georgia railroad from Atlanta, Georgia, to Augusta, Georgia, a distance of one hundred and seventy-one

miles; over the South Carolina railway from Augusta to Summerville, a distance of one hundred and fifteen miles. And respondent admits that said railroads are common carriers, and are engaged in the transportation of passengers wholly by railroad between points in the States of Tennessee and South Carolina.

2. Respondent admits that the haul from Memphis to Summerville is twenty-two miles shorter than the haul from Memphis to Charleston, and that said shorter distance is included in the longer distance.

3. Respondent admits that a greater compensation in the aggregate was received for the transportation of said two car-loads of hay from Memphis to Summerville than would have been charged for the same if they had been transported to Charleston.

4. Respondent submits that the aggregate charge of twenty-eight cents per hundred from Memphis to Summerville is not excessive, and not unreasonable and not in violation of section 1 of the act of Congress of February 4th, 1887, entitled An act to regulate commerce.

5. Respondent submits that the acts complained of in the petition are not in violation of the fourth section of the aforesaid act, for the following reasons, to wit:

1. The Georgia Railroad Company and the other carriers complained against, have no joint through tariff from Memphis to Summerville, and therefore they have no "line" in the sense of said section from Memphis to Summerville on which said section can operate.

2. The transportation of two car-loads of hay from Memphis to Summerville is not done under substantially similar circum-
14 stances and conditions as the transportation of like property from Memphis to Charleston, for—

(First.) Summerville is a local station on the South Carolina railway. It is not on any water route, and enterprise and capital have not constructed more than one railroad to it. It has not, therefore, the advantage of competition of carriers. The one railroad, on which it is situated, viz: the South Carolina Railway Company is not compelled by competition to choose between a reasonable rate and a rate which is much below what would be reasonable. On the other hand, at Charleston there exists competition with numerous all-rail routes between Memphis and Charleston. Respondents here mention eight of these all-rail routes between Memphis and Charleston, to wit:

Memphis and Charleston railroad; East Tennessee, Virginia and Georgia railroad; Savannah, Florida and Western railway, and Charleston and Savannah railway.

Memphis and Charleston; Western and Atlantic; Central Railroad and Banking Company of Georgia, and Charleston and Savannah.

Memphis and Charleston; Western and Atlantic, East Tennessee, Virginia and Georgia or Central Railroad and Banking Company of Georgia; Seaboard air line; Columbia, Newberry and Laurens, and the Atlantic coast line.

Kansas City, Memphis and Birmingham; Central Railroad and Banking Company of Georgia; Port Royal and Augusta and Charleston and Savannah.

Kansas City, Memphis and Birmingham; Georgia Pacific; Richmond and Danville, and Atlantic coast line.

Kansas City, Memphis and Birmingham; Louisville and Nashville; Alabama Midland; Savannah, Florida and Western, and Charleston and Savannah.

Louisville and Nashville; Nashville, Chattanooga and St. Louis; Western and Atlantic; Georgia railroad, and South Carolina railway.

Louisville and Nashville; Nashville, Chattanooga and St. Louis; Western and Atlantic; Seaboard air line, and Atlantic coast line or Port Royal and Western Carolina; Port Royal and Augusta, and Charleston and Savannah railroads.

Besides these enumerated all-rail routes there are others, which could be designated. These lines are not only potential but are actual competitors with these respondents and their codefendants, for business from Memphis to Charleston.

(Second.) Charleston is a port on the Atlantic coast, accessible and easily reached from the ports of Baltimore, Philadelphia, New York, Boston and other eastern ports, from which hay is shipped by water. If the rail lines from Memphis to Charleston charged rates to Charleston as high as the rate to Summerville, although the latter rate is in itself reasonable, no hay would be brought from Memphis to Charleston, but Charleston would be supplied with hay from North Atlantic ports and the railroads would lose the hay business and Memphis would lose a hay market.

15 (Third.) The rates on western produce to Charleston and other coast cities, such as Savannah, Port Royal and Brunswick, are made with a view to actual, existing water competition. Western produce such as grain, hay, etc., distributed from Chicago, can reach Charleston through the ports of New York, Philadelphia, or Baltimore, over continuous water routes via the lakes and canal, or over combined rail and water routes.

The all-rail lines, seeking to do business between Chicago and Charleston and other coast cities, are compelled to make their rates as much higher as the difference in service will permit, and those rates are correspondingly adjusted from all western points, such as Evansville, Cairo, St. Louis, Memphis, etc. At present the all-rail rate from Chicago to Charleston on hay, for instance, is 33c. per 100 lbs.; from St. Louis, 28c.; from Louisville, Evansville and Cairo, 23c.; and from Memphis, 19c.—the route through Memphis offering facilities for the transportation of hay, grain and western products generally, from the States of Missouri, Kansas, Nebraska, etc.

The rate from Memphis to Charleston on hay is, therefore, forced upon the defendant lines by actual existing water competition and by other competition beyond the control of the defendant.

The controlling element in said competition is the lake, canal and ocean transportation between Chicago and Charleston; or the

lake transportation from Chicago to Buffalo, or other lake port, thence by rail to New York, thence by ocean to Charleston; or rail transportation from Chicago to Baltimore, Philadelphia or New York, thence by ocean to Charleston.

(Fourth.) As above stated, the Georgia Railroad Company, and the other carriers complained against, have no joint through tariffs from Memphis to Summerville. They do have joint through tariffs from Memphis to Charleston, and the joint through rate from Memphis to Charleston on hay is 19c. per 100 lbs.

Respondent admit- that he charges a local rate of 9c. per 100 lbs. on hay between Charleston and Summerville, which added to the 19c. per 100 lbs. from Memphis to Charleston makes the total combined through and local rate Memphis to Summerville 28c. per 100 lbs. of hay.

Respondent submits that said local rate of 9c. per 100 lbs., so charged by the respondent receiver, between Charleston and Summerville is just and reasonable.

(Signed) BRAWLEY & BARNWELL,
Counsel for Receiver.

STATE OF SOUTH CAROLINA, }
Charleston County. }

Personally appeared before me Daniel H. Chamberlain, who, being duly sworn, says that the matters and things in said answer stated so far as they depend upon his own knowledge are true, and so far as they depend upon the information of others, he believes them to be true.

DANIEL H. CHAMBERLAIN.

16 Sworn to before me this 24th day of March, 1893.
NATH. LEVIN,
[SEAL.] *Notary Public.*

Answer of Charles M. McGhee and Henry Fink, Receivers.

H. W. BEHLMER
vs.
MEMPHIS & CHARLESTON RAILROAD COMPANY ET AL.

Chas. M. McGhee and Henry Fink, receivers of the East Tennessee, Virginia and Georgia Railway Company and the Memphis and Charleston Railroad Company, for answer to the complaints in this proceeding respectfully state:

1. As to the truth of the allegations of the first, second and third paragraphs in the petition contained, they are not advised and can neither admit nor deny the same, but demand proof thereof, so far as is material.

2. They admit the statement in the fourth paragraph of said petition except as to the shipment of said two car-loads of hay over the lines mentioned, as to which they are uninformed.

3. They do not admit the allegations of the fifth paragraph of the petition, and especially deny the averment that the haul from

Memphis, Tennessee, to Summerville, S. C., is made under substantially similar circumstances and conditions as Charleston traffic, and they demand proof of all the material averments of said paragraph.

4. They do not admit the averments of the sixth and seventh paragraph- and demand proof of the same.

5. They do not admit either the facts or conclusions therefrom drawn, as contained in the eighth paragraph and demand proof of the same.

6. They do not admit the allegations contained in the ninth paragraph and they demand proof of the same so far as is material.

7. They deny both the statement of facts and the conclusions stated in the tenth paragraph.

8. They admit the statement in the eleventh.

9. They are not advised as to the truth of the statement contained in the twelfth paragraph, and so far as is material demand proof thereof.

10. They admit the statement contained in the thirteenth paragraph except as to the addresses and residences of these defendants which are New York, N. Y., and not Knoxville, Tenn.

11. As to the statements contained in the fourteenth paragraph, they are not fully advised and neither admit nor deny them but, if material, they demand proof of the same.

12. They do not admit the allegations of the fifteenth paragraph of the petition, and they demand full proof of every material averment therein set forth.

17 Therefore, these defendants pray that the complainant in this proceeding be dismissed.

(Signed) CHAS. M. McGHEE,
HENRY FINK,
Receivers E. T., V. & G. R'y Co. and M. & C. R'd.

STATE OF TENNESSEE, }
County of Knox. }

Edwin Fitzgerald, being duly sworn, says that he is the traffic manager for Chas. M. McGhee and Henry Fink, receivers of the East Tennessee, Virginia and Georgia Railway Company and Memphis and Charleston Railroad Company, defendants in this proceeding, and that the foregoing answer is true, as he verily believes.

(Signed) EDWIN FITZGERALD.

Subscribed and sworn to before me this 16th day of February, 1893.

(Signed) C. H. HURVEY,
U. S. Commissioner.

Report and Opinion of the Commission.

YEOMANS, *Commissioner:*

The complainant alleges on behalf of himself and other merchants and residents of Summerville, S. C., that the defendants

charge an unreasonable and excessive rate of 28 cents per 100 lbs. on hay in car-load lots from Memphis to Summerville; that said rate of 28 cents is 9 cents per 100 lbs. greater than the defendants charge and receive for transporting hay in car-loads from Memphis through Summerville to Charleston, S. C., and that such greater charge constitutes a violation of the long and short haul clause of the statute; that said rate of 28 cents to Summerville is equal to the rate of 19 cents in force on hay in car-loads from Memphis through Summerville to Charleston plus the local rate of 9 cents per 100 lbs. charged over the South Carolina railway for carrying hay from Charleston back to Summerville, and that said 9-cent local rate which complainant is forced to pay in addition to the through Charleston rate in order to get hay transported by defendants from Memphis to Summerville is also unreasonable and excessive. The shipment of two car-loads of hay from Memphis to Summerville in August, 1892, upon which complainant was compelled to pay the 28-cent rate is specified in the complaint. The complainant also alleges generally that the defendants engaged in transportation from Memphis to Charleston are subject to the act to regulate commerce; that all of the roads involved in this proceeding are members of the Southern Railway and Steamship Association, and that the discrimination and excessive rates against Summerville exist not only on hay but on all articles of interstate commerce coming to that place to the detriment and disadvantage of the town and the business of its merchants. The complaint prays
18 that defendants be ordered to cease and desist from further violating the law as therein alleged and from all similar violations, and for such other and further order as the commission may deem necessary in the premises.

The joint answer of the receivers of the East Tennessee, Virginia and Georgia Railway Company and the Memphis and Charleston Railroad Company admits that they are subject to the act to regulate commerce, and that the shipment of hay took place as specified in the complaint, but they do not admit that the rates set forth in the complaint constitute any violation of the law, and demand proof of the same.

The joint answer of the lessees of the Georgia railroad and the answer of the receiver of the South Carolina Railway Company are substantially the same. These answers, while admitting the rates to be as stated in the complaint, and that the shipment specified in the complaint was made over the defendant roads, deny that said rates are in violation of the act to regulate commerce. In relation to complainant's allegation of violation of the fourth section, these answers contain the following specific averments:

1. The Georgia Railroad Company and the other carriers complained against, have no joint through tariff from Memphis to Summerville, and therefore they have no "line" in the sense of said section from Memphis to Summerville on which said section can operate.

2. The transportation of two car-loads of hay from Memphis to Summerville is not done under substantially similar circumstances

and conditions as the transportation of like property from Memphis to Charleston, for—

(First.) Summerville is a local station on the South Carolina railway. It is not on any water route, and enterprise and capital have not constructed more than one railroad to it. It has not, therefore, the advantage of competition of carriers. The one railroad, on which it is located, viz: the South Carolina Railway Company is not compelled by competition to choose between a reasonable rate and a rate which is much below what would be reasonable. On the other hand, at Charleston there exists competition with numerous all-rail routes between Memphis and Charleston. Respondents here mention eight of these all-rail routes between Memphis and Charleston, to wit:

Memphis and Charleston railroad; East Tennessee, Virginia and Georgia railroad; Savannah, Florida and Western railway, and Charleston and Savannah railway.

Memphis and Charleston; Western and Atlantic; Central Railroad and Banking Company of Georgia, Port Royal and Augusta and Charleston and Savannah.

Memphis and Charleston; Western and Atlantic, East Tennessee, Virginia and Georgia or Central Railroad and Banking Company of Georgia; Seaboard air line; Clinton, Newberry and Laurens, and the Atlantic coast line.

Kansas City, Memphis and Birmingham; Central Railroad and Banking Company of Georgia; Port Royal and Augusta and Charleston and Savannah.

19 Kansas City, Memphis and Birmingham; Georgia Pacific; Richmond and Danville, and Atlantic coast line.

Kansas City, Memphis and Birmingham; Louisville and Nashville; Alabama Midland; Savannah, Florida and Western, and Charleston and Savannah.

Louisville and Nashville; Nashville, Chattanooga and St. Louis; Western and Atlantic; Georgia railroad, and South Carolina railway.

Louisville and Nashville; Nashville, Chattanooga and St. Louis; Western and Atlantic; Seaboard air line, and Atlantic coast line or Port Royal and Western Carolina; Port Royal and Augusta, and Charleston and Savannah railroads.

Besides these eight enumerated all-rail routes there are others, which could be designated. These lines are not only potential but are actual competitors with these respondents and their codefendants, for business from Memphis to Charleston.

(Second.) Charleston is a port on the Atlantic coast, accessible and easily reached from the ports of Baltimore, Philadelphia, New York, Boston and other eastern ports, from which hay is shipped by water. If the rail lines from Memphis to Charleston charged rates to Charleston as high as the rate to Summerville, although the latter rate is in itself reasonable, no hay would be brought from Memphis to Charleston, but Charleston would be supplied with hay from North Atlantic ports and the railroads would lose the hay business and Memphis would lose a hay market.

(Third.) The rates on western produce to Charleston and other coast cities, such as Savannah, Port Royal and Brunswick, are made with a view to actual existing water competition. Western produce such as grain, hay, etc., distributed from Chicago, can reach Charleston through the ports of New York, Philadelphia, or Baltimore, over continuous water routes via the lakes and canal, or over combined rail and water routes.

The all-rail lines seeking to do business between Chicago and Charleston and other coast cities, are compelled to make their rates approximate those which are offered by the continuous water route or by the combined rail and water routes. The all-rail routes make their rates as much higher as the difference in service will permit, and those rates are correspondingly adjusted from all western points, such as Evansville, Cairo, St. Louis, Memphis, etc. At present the all-rail rates from Chicago to Charleston on hay, for instance, is 33c. per 100 lbs.; from St. Louis, 28c.; from Louisville, Evansville and Cairo, 23c.; and from Memphis, 19c.—the route through Memphis offering facilities for the transportation of hay, grain and western products generally, from the States of Missouri, Kansas, Nebraska, etc.

The rate from Memphis to Charleston on hay is, therefore, forced upon the defendant lines by actual existing water competition and by other competition beyond the control of the defendant.

The controlling element in said competition is the lake, canal and ocean transportation between Chicago and Charleston; or the lake transportation from Chicago to Buffalo, or other lake port, thence by rail to New York, thence by ocean to Charleston; or rail transportation from Chicago to Baltimore, Philadelphia or New York, thence by ocean to Charleston.

(Fourth.) As above stated, the Georgia Railroad Company, and other carriers complained against, have no joint through tariffs from Memphis to Summerville. They do have joint through tariffs from Memphis to Charleston, and the joint through rate from Memphis to Charleston on hay is 19c. per 100 lbs.

If it shall appear in this case that the defendants violate the long and short haul clause of the law by keeping the higher rate to Summerville in force, it will be unnecessary to consider in this report whether the rate to Summerville is in violation of other provisions of the law. In that event the prohibition of the fourth section will afford all the reduction demanded in the complaint.

Facts and Conclusions.

Transportation from Memphis to Charleston via the connecting and continuous line formed by the defendants' railroads passes through Summerville, a point on the South Carolina road 21 miles west of Charleston, which road is also the delivering carrier for traffic over this line to Charleston. Their rate in force for the carriage of hay in full car-loads from Memphis to Summerville, is 28 cents per hundred pounds, and this rate is equal to a combination of the 19-cent rate to Charleston plus a 9-cent local of the South

Carolina road back to Summerville. Shipments from Memphis to either Charleston or Summerville are carried through over this line of connecting roads under through bills of lading.

The defendants make a joint tariff rate on hay to Charleston from Memphis, and unless they show substantial dissimilarity in circumstances and conditions under which the transportation to Charleston and Summerville is conducted, they are prohibited by the fourth section of the law from making any greater charge for the shorter distance to Summerville than that which they have in force for carrying over the same line in the same direction for the longer distance to Charleston.

The defendants claim that substantial dissimilarity in such circumstances and conditions is created by:

1. The competition of various markets for the trade of Charleston, such as New York, Boston, Philadelphia, Baltimore, Chicago, and other points which can reach Charleston by all-water lines or by all rail or part rail and part water routes.

2. The competition of all-rail lines between Memphis and Charleston.

The construction of the fourth section of the act as laid down in the case of *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.*, 3 Inters. Com. Rep., 682; 4 I. C. C. Rep. 744, and in *Ga. R. R. Com. v. Clyde S. S. Co.*, 4 Inters. Com. Rep., 120; 5 I. C. C. Rep., 324—followed and explained in *Gerke Brew. Co. v. Louisville & N. R. Co.*, 4 Inters. Com. Rep., 267; 5 I. C. C. Rep., 596—and also reaffirmed by the commission in *Chattanooga Board of Trade v. East*
21 *Tennessee, V. & G. R. Co.*, 4 Inters. Com. Rep. 213; 5 I. C. C. Rep., 546, has been passed upon by the Federal courts in the proceeding brought by this commission against the Cincinnati, New Orleans and Texas Pacific Railway Company and others to enforce its order in the first above-mentioned case (*James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co.*) The decision of the United States circuit court for the northern district of Georgia reviewed the construction of the fourth section by the commission, and declared that construction to be altogether unsound. *Interstate Commerce Com. v. Cincinnati, N. O. & T. P. R. Co.*, 4 Inters. Com. Rep., 332; 56 Fed. Rep., 925. But the commission took an appeal to the circuit court of appeals for the fifth judicial circuit, and that court has recently rendered a decision annulling and reversing the decision of the circuit court, and remanding the case with instruction to enforce the long-and-short-haul order of the commission in that case. *Interstate Commerce Com. v. Cincinnati, N. O. & T. P. R. Co.* circuit court of appeals. (Not yet reported.)

This decision of the circuit court of appeals amounts to an affirmance of the commission's construction of the meaning of the fourth section as laid down in the cases above mentioned, and under that construction the complaint in this case must be sustained. There is no showing in this proceeding of competition by lines not subject to the act to regulate commerce for the carriage of hay from Memphis to Charleston, and the fact that there may be competition for such traffic by lines which are subject to the act, or that hay may be

carried to Charleston by various rail and water or part rail and part water routes from points other than Memphis, does not justify the defendant carriers in departing from the general rule of the fourth section upon their own motion. Such considerations may constitute reasons for applying to the commission for relief under the proviso clause of that section, but for reasons stated in our decisions of the cases above cited they do not justify carriers in departing from the rule of the fourth section without such a relieving order. Water competition, to justify lower long-haul rates, must exist between the point of shipment and the longer distance point of destination. *James & M. Buggy Co. v. Cincinnati, N. O. & T. P. R. Co., supra.* One transportation line cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could and would perform the service alone if the former did not undertake it. *Chattanooga Board of Trade v. East Tennessee, V. & G. R. Co., supra.* The competition of markets or the competition of carrying lines subject to regulation under the act to regulate commerce does not justify carriers in making greater short-haul or lower long-haul charges over the same line without an order issued by the commission on application therefor and after investigation. *Ga. R. R. Com. v. Clyde S. S. Co.*, 4 Inters. Com. Rep., 120; 5 I. C. C. Rep., 324, and *Gerke Brew. Co. v. Louisville & N. R. Co.*, 4 Inters. Com. Rep., 267; 5 I. C. C. Rep., 596.

The following rule of practice was laid down by us in the Georgia railroad commission cases: "When a carrier on complaint
22 under the fourth section avers substantial dissimilarity in circumstances and conditions as justifying its greater charge for shorter hauls, it is concluded by its pleading and must affirmatively show that the circumstances and conditions of which it is entitled to judge in the first instance are in fact substantially dissimilar; but upon an application for relief under the fourth-section proviso the carrier is not limited by such a rule of evidence, and may present to the commission every material reason for an order in its favor."

Because Charleston is an important seaport and railroad centre, and hay may be and is carried there from various points, is not sufficient reason for a departure from this rule. The just interests of the carriers are fully protected by the proviso clause of the fourth section. The defendants are under no obligation to compete at low rates for the carriage of hay from Memphis to Charleston. They ought not to engage in such competition if the rates obtainable are not remunerative. If they are remunerative the defendant cannot, in the face of the prohibition of the fourth section, and the provision in that section for the issuance of relieving orders, assume to say that such rates though profitable on Charleston traffic are insufficient for the transportation of car load qualities to a shorter distance point on the same line and in the same direction. That is a question which Congress, by enacting the proviso or saving clause in the fourth section, made it the duty of this commission to determine. The very reason why the proviso was added to the

section was to enable carriers to obtain relief from hardship in special cases if, upon application for relief, they make it appear that hardship actually exists.

Neither of the defendants having applied for relief under the proviso to the fourth section; order will be entered directing them to cease and desist, on or before July 15, 1894, from charging or collecting any greater sum in the aggregate for the transportation from Memphis to Summerville of hay, or other commodities carried by them under circumstances and conditions similar to those appearing in this case, than they do for such transportation for the longer distance to Charleston, but without prejudice to the right of said defendants to apply for relief under the fourth section of the act to regulate commerce. The filing of an application for relief by the defendants, or either of them, before the time above specified, will, if it refers to transportation over this line to Charleston, operate as a stay upon this order during the pendency of proceedings on such application.

EXHIBIT D.

Order of the Commission.

At the general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 27th day of June, A. D. 1894.

Present: Hon. William R. Morrison, chairman; Hon. Wheelock G. Veazey, Hon. Martin A. Knapp, Hon. Judson C. Clements, Hon. James D. Yeomans, commissioners.

23 H. W. BEHLMER
vs.
THE MEMPHIS AND CHARLESTON RAILROAD COMPANY, THE East Tennessee, Virginia and Georgia Railway Company, The Georgia Railway and Banking Company, The South Carolina Railway Company, Henry Fink and Charles M. McGhee, as Receivers of the East Tennessee, Virginia and Georgia Railway Company and the Memphis and Charleston Railroad Company; Daniel H. Chamberlain, as Receiver of the South Carolina Railway Company; The Central Railroad and Banking Company of Georgia, and The Louisville and Nashville Railroad Company, as Lessees of the Georgia Railroad, and H. M. Comer, as Receiver of the Central Railroad Banking Company of Georgia.

Order of the Commission.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties and the commission having on the date hereof, made and filed a report and opinion herein containing its findings of fact and conclusions thereon, which said report and opinion is hereby referred to and made a part of this order; and the commission having, as appears

by said report and opinion, found and decided that the complaint in this case should be sustained:

It is ordered and adjudged, that the defendants, The Memphis and Charleston Railroad Company; The East Tennessee, Virginia and Georgia Railway Company; The Georgia Railroad and Banking Company; The South Carolina Railway Company; Henry Fink and Charles M. McGhee, as receivers of the East Tennessee, Virginia and Georgia Railway Company and the Memphis and Charleston Railroad Company; Daniel H. Chamberlain, as receiver of the South Carolina Railway Company; The Central Railroad and Banking Company of Georgia, and The Louisville and Nashville Railroad Company, as lessees of the Georgia railroad; and H. M. Comer, as receiver of the Central Railroad and Banking Company of Georgia, and each of them, do wholly cease and desist on or before the 15th day of July, 1894, and thenceforth abstain, from charging, demanding collecting or receiving any greater compensation in the aggregate for the transportation of hay, or other commodities carried by them under circumstances and conditions similar to those appearing in this case, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than they contemporaneously charge and receive for the transportation of hay and such other commodities, respectively, for the longer distance from Memphis aforesaid to Charleston, in the State of South Carolina.

And it — further ordered, that a notice embodying this order be forthwith sent to each of the defendants in this case, together with a copy of the report and opinion of the commission herein, in conformity with the provisions of the fifteenth section of the act to regulate commerce.

24 INTERSTATE COMMERCE COMMISSION,
WASHINGTON, D. C.

I, Edward A. Moseley, secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached and entitled, report and opinion of the commission and order of the commission, are true copies of the originals, now on file, and recorded in the office of this commission.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the commission, this 6th day of July, 1894.

[SEAL.] EDW. A. MOSELEY, *Secretary*.

Foregoing petition and exhibits filed November 2, 1894.

H. W. BEHLMER
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL.

Order to Show Cause on December 3, 1891, and to Restrain Charges Complained of Pending These Proceedings.

These proceedings having been filed under "An act to regulate commerce," approved February 4, 1887, and subsequent amend-

ments thereto, it is, on motion of Claudian B. Northrop, petitioner's solicitor—

Ordered and directed by the court that the defendant corporations in the above-entitled cause, and their several successors and receivers appear before the United States circuit court, at the court-room in Columbia, South Carolina, on Monday, the third day of December, 1894, or as soon thereafter as counsel can be heard, to answer said proceedings and to show cause why the prayer of the petition should not be granted.

It is further ordered, that pending these proceedings and the hearing thereon, the said The Louisville and Nashville Railroad Company, and the Central Railroad and Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia railroad, the Memphis and Charleston Railroad Company, the East Tennessee, Virginia and Georgia Railway Company, and Samuel Spencer, Henry Fink, and Charles M. McGhee, as receivers of said last two mentioned roads; and the Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia and Georgia Railway Company; and the South Carolina Railway Company, and its receiver, Daniel H. Chamberlain; and the South Carolina and Georgia Railroad Company, the purchaser, assignee and successor of the same, be and each and every one of them are hereby ordered, commanded, restrained and enjoined from demanding, charging, collecting or receiving any greater compensation in the aggregate for the transportation of hay, or other commodities carried by them under circumstances and conditions similar to those in this case, from Memphis, in the State of Tennessee, to Sum-
25 merville, in the State of South Carolina, than they contemporaneously charge and receive for the transportation of hay and such other commodities respectively, for the longer distance from Memphis to Charleston, in the State of South Carolina.

And that the South Carolina and Georgia Railroad Company be and is hereby particularly ordered, restrained and enjoined from imposing, demanding, charging, collecting or receiving the added local of nine cents in addition to the through rate of nineteen cents to Charleston.

Further ordered, that a copy of this order be served on each of the defendants residing in this State, by serving any of the principal officers of the same in this State, and that the non resident defendants be served by serving a copy of said order on the principal representatives of said corporations who can be found in this State, if there be such, and that in addition thereto said non-resident defendants be notified by sending a copy of this order in a registered letter to the president or chief officer of the same, wherever located.

In open court this 2d day of November, 1894,

CHARLES H. SIMONTON,
Circuit Judge.

I, J. E. Hagood, clerk of said court, do hereby certify that the foregoing is a true copy of the original now on file in my office.

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Given under my hand and seal of said court, in the city of Charleston, S. C., this the 2d day of November, A. D. 1894.

J. E. HAGOOD,
[SEAL.] *C. C. C. U. S., District S. C.*

Filed November 2, 1894.

Notice.

In the Circuit Court of the United States for the District of South Carolina.

H. W. BEHLMER
vs.
THE LOUISVILLE AND NASHVILLE R. R. CO. ET AL.

Please take notice that in this case the defendants, The Louisville and Nashville Railroad Company, The Central Railroad and Banking Company of Georgia; H. M. Comer, receiver of the railroad of said last-mentioned company; The Memphis and Charleston Railroad Company; The East Tennessee, Virginia and Georgia Railway Company; Samuel Spencer, Henry Fink and Charles M. McGhee, receivers of the railroads of said two last-mentioned companies; The South Carolina Railway Company and Daniel H. Chamberlain, receiver of the railroad of said last-mentioned railway company, having filed their joint and several answer to the petition in this case, respectfully move the court to set aside and annul the restraining order heretofore granted in this case,
26 on the 2d day of November, 1894; said motion to be heard upon said petition and answer and affidavits, on Wednesday, Nov. 21, 1894, at 10 o'clock a. m., at U. S. court-house.

JOS. W. BARNWELL,
W. A. HENDERSON,
JOS. B. CUMMING,
ED. BAXTER,
Of Counsel.

To Claudian B. Northrop, solicitor for petitioner.
Filed November 20, 1894.

Notice.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit.

In the Circuit Court.

H. W. BEHLMER
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL.

To Claudian B. Northrop, solicitor for petitioner:

Please take notice that on Tuesday next November the 20th, 1894, at 10 o'clock a. m., at the United States court-house in

Charleston, the undersigned will move before said court, or in case the same be not in session, before the Honorable Charles H. Simonton, circuit judge, for an order setting aside the temporary injunction granted in above case against the South Carolina and Georgia Railroad Company on the ground that the said court has no jurisdiction under the proceedings in this case to enjoin the defendant, The South Carolina and Georgia Railroad Company, inasmuch as the said company was not a party to the proceeding before the Interstate Commerce Commission in the case of H. W. Behlmer, against the Memphis and Charleston Railroad Company, referred to in the petition, and has therefore, never been served with any legal order or notice by said commission and has therefore, never refused or declined to obey any legal order of said commission. Please take further notice that the undersigned appears in this cause solely for the purpose of making the above objections to the said order of injunction and for the purpose of setting aside the same.

JOS. W. BARNWELL,
Solicitor for S. C. & Ga. R. R.

I accept service of within notice this 16th day of November, 1894.
C. B. NORTHROP,
Per FITZSIMONS.

Filed November 20, 1894.

Joint and Several Answer.

The joint and several answer of the Louisville and Nashville Railroad Company, the Central Railroad and Banking Company of Georgia, H. M. Comer, receiver of the railroad of said last-mentioned company; the Memphis and Charleston Railroad Company, the East Tennessee, Virginia and Georgia Railway Company, Samuel Spencer, Henry Fink, and Charles M. McGhee, receivers of the railroads of said two last-mentioned companies; the South Carolina Railway Company, and Daniel H. Chamberlain, receiver of the railroad of said last-mentioned company, to the petition filed by H. W. Behlmer against these respondents and others in the circuit court of the United States for the district of South Carolina, in equity.

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These defendants, respectively, now and at all times hereafter saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had, or taken, to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering, say:

1. Respondents admit that H. W. Behlmer, the petitioner in this case, is a citizen and resident of the town of Summerville, in the State of South Carolina; that respondent, The Louisville and Nashville Railroad Company, is a corporation created, chartered, and

existing under and by virtue of the laws of the State of Kentucky, having its principal office at Louisville, in the State of Kentucky; that respondent, The Central Railroad and Banking Company of Georgia, is a corporation created, chartered, and existing under and by virtue of the laws of the State of Georgia, having its principal office in the city of Savannah; that respondent, H. M. Comer, has been duly appointed by a competent court, receiver of the railroad of said last-mentioned company, and is now, and has for more than six months last past, been its receiver; and that R. Somers Hayes has lately been associated as coreceiver of the railroad of the said Central Railroad and Banking Company of Georgia.

Respondents deny that there is any such corporation as the "Georgia Railroad Company." There is a corporation known as the Georgia Railroad and Banking Company, and its railroad, in the State of Georgia, is operated under the name of "Georgia Railroad Company," with its principal office at Augusta, in the State of Georgia, and the above-named, the Central Railroad and Banking Company of Georgia, and the Louisville and Nashville Railroad Company, are the assignees of the lessee of said railroad. Respondents admit that respondent, The East Tennessee, Virginia and Georgia Railway Company is a corporation created, chartered, and existing under and by virtue of the laws of the State of Tennessee, having its principal office at Knoxville, in the said State of Tennessee, and that respondents, Samuel Spencer, Charles M. McGhee, and Henry Fink, were duly appointed the receivers of the railroad of the said East Tennessee, Virginia and Georgia Railway Company; that defendant, The Southern Railway Company, a corporation created, chartered, and existing under and by virtue of the laws of the State of Virginia, having its principal office at Washington, in the District of Columbia, now owns, controls, and
28 operates the railways formerly operated by the said East Tennessee, Virginia and Georgia Railway Company; that respondent, The Memphis and Charleston Railroad Company, is a corporation created, chartered, and existing under and by virtue of the laws of Tennessee and Alabama, and that respondents, Samuel Spencer, Henry Fink, and Charles M. McGhee, of the city and State of New York, are now, and for more than six months last past have been, the receivers of the railroad of said Memphis and Charleston Railroad Company, controlling and operating the same; that respondent, The South Carolina Railway Company, is a corporation created, chartered, and existing under and by virtue of the laws of the State of South Carolina, having its principal office at Charleston, in the State of South Carolina, and that respondent, D. H. Chamberlain, is now, and for more than six months last past, has been the receiver of the railroad of the said South Carolina Railway Company; that defendant, The South Carolina and Georgia Railroad Company, is a corporation created, chartered, and existing under and by virtue of the laws of South Carolina, and that it now owns, controls, and operates the railways formerly operated by said South Carolina Railway Company; that each of the said above-described corporations and persons was, on the — day of December, 1892, or has

since become, a common carrier, engaged in the transportation of passengers and property wholly by railroad, by itself, or together with some one or more, or all, of the said other above-named defendants, between points in different States of the United States, and particularly from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina; but as to whether said defendants, or either of them, as such common carriers, so engaged in transportation as aforesaid, were, at the time aforesaid, or have been since, or are now, subject to any of the provisions of an act of Congress of the United States, entitled "An act to regulate commerce," approved February 4, 1887, or to the provisions of any of the amendments of said act, is a question of law, which is respectfully submitted to the consideration of the court.

2. Respondents admit that on or about the 29th day of December, 1892, the said H. W. Behlmer filed a petition before the Interstate Commerce Commission against respondents, The Memphis and Charleston Railroad Company, The East Tennessee, Virginia and Georgia Railway Company, The South Carolina Railway Company, Henry Fink and Charles M. McGhee, as receivers of the East Tennessee, Virginia and Georgia Railway Company and the Memphis and Charleston Railroad Company, Daniel H. Chamberlain, as receiver of the South Carolina Railway Company, The Central Railroad and Banking Company of Georgia, and The Louisville and Nashville Railroad Company, as "lessee" of the Georgia railroad, and H. M. Comer, as receiver of the Central Railroad and Banking Company. Said petition was also filed against the Georgia Railroad and Banking Company. None of the other defendants to the petition filed in this court were made defendants to said petition filed before said commission. Respondents suppose it to
29 be true that Exhibit "A" to the petition filed in this court is a true copy of said petition filed before said commission, but respondents have not seen said Exhibit "A."

Respondents deny that they, or either of them, or that any of their codefendants, were heretofore, on the — day of December, 1892, or on any other day, duly impleaded, either by themselves, or with other common carriers, before the Interstate Commerce Commission, because, as respondents are advised, said commission is not a court.

Respondents admit that said petition, filed before said commission, was filed for certain alleged violations on the part of said defendants thereto, of certain provisions of the "act to regulate commerce," as will more fully and at large appear in and by a true copy of said petition, when the same shall be produced; and respondents pray that it may be allowed to speak for itself, when so produced. As to whether the controversy raised by said petition is one not requiring a trial by jury, as provided for in the seventh amendment to the Constitution of the United States, is a question of law, which is respectfully submitted to the consideration of the court.

3. Respondents admit that afterwards, and forthwith, copies of the said petition, filed before the said commission, were duly served

upon the defendants named therein, with full and timely notice to satisfy the claim, or make answer thereto.

4. Respondents admit that afterwards answers to said petition, filed by said Behlmer before said commission, were filed by the defendants named in said petition, to wit: by The Louisville and Nashville Railroad Company, and The Central Railroad and Banking Company, and Charles M. McGhee and Henry Fink, receivers of the Memphis and Charleston Railroad Company, and The East Tennessee, Virginia and Georgia Railway Company, and by Daniel H. Chamberlain, receiver of the South Carolina Railway Company. Respondents suppose that said answers are on file in the office of said commission. Respondents suppose that Exhibit "B" to the petition filed in this court, contains true copies of said answers, annexed in consecutive order, as above set forth, but respondents have never seen said exhibit. They pray that said answers be allowed to speak for themselves, when true copies thereof shall be filed, if said exhibit does not already contain such copies.

5. Respondents admit that afterwards, the said parties being at issue upon said petition, filed before said commission, and the respective answers thereto, as aforesaid, the said matters were duly and regularly brought on for hearing and investigation before said Interstate Commerce Commission, duly and legally assembled for that purpose, at the city of Charleston, in the State of South Carolina, on the 4th day of April, 1893, when the said H. W. Behlmer, as well as the said East Tennessee, Virginia and Georgia Railroad Company, and said Memphis and Charleston Railroad Company, and said South Carolina Railway Company, and said Louisville and Nashville Railroad Company, and said Central Railroad and Banking Company of Georgia, duly appeared, by their attorneys.

6. Respondents deny that during the said hearing, or investigation, or at any other time, it was made to appear to the satisfaction of said commission that these respondents, or either of them, or any of the other defendants to said petition, filed before said commission, had violated the provisions of said "act to regulate commerce," in certain respects, or in any respect, either as was stated to have been violated by them in said petition, or in any other way.

Respondents deny that they, or either of them, or any of their codefendants in said petition, had, as a matter of fact, violated any of the provisions of said act, or of any of the amendments to said act, in any respect whatever, in regard to any of the matters referred to in said petition.

Respondents admit that on or about June 27th, 1894, said commission made a full report in writing, of its so-called findings of fact, in respect to such matters and things in controversy and at issue between said parties, and of its so-called conclusions, based upon such so-called findings of fact; and respondents suppose that Exhibit "C" to the petition, filed in this court, is a true copy of said report of said so-called findings and conclusions, but respondents have not seen said exhibit.

Respondents deny that said commission, on the 27th day of June, 1894, or on any other day, duly or legally determined the matters or things drawn in controversy, or at issue between said parties; or that said commission duly or legally determined any of said matters or things. On the contrary, respondents are advised, and insist that said so-called determination of said commission was, and is, in many material respects, erroneous, illegal, and void; and that said so-called findings of fact, reported by said commission, were, and are, erroneous and untrue in many material respects. Respondents are advised, and insist, that said conclusions of law, as determined by said commission from said so-called findings of fact, were erroneous and illegal in many material respects.

7. Respondents admit that thereafter, and forthwith, upon the so-called determination of said matters as aforesaid, said commission undertook to formulate an order and notice, based upon said so-called findings of fact and conclusions of said commission, as set forth in its said report hereinbefore referred to; and respondents suppose that Exhibit "D" to the petition, filed in this court, is a true copy of said order and notice; but respondents deny that said order and notice, or either of them, were lawful, or were duly made or entered, or that they were made agreeably to the provisions of the statutes in such cases made and provided.

8. Respondents admit that afterwards the said commission did cause a properly authenticated copy of its said report of so-called findings of fact and conclusions in said matters, together with a copy of said order and notice, to be delivered to each and all of the parties to the said petition, filed before said commission, their receivers and successors in operation.

31 It may be true that said commission has assumed to establish and promulgate certain rules of practice in cases and proceedings before it, whereby certain provision is assumed to be made for the showing of error, or of newly discovered material evidence, by parties against whom an adverse report and order may have been made by the commission, and also for the granting of rehearings upon such showing; but as to whether said commission had any legal authority to establish or promulgate such rules, is a question of law which is respectfully submitted to the court. At all events, respondents are advised that there is no law requiring a party, against whom said commission may have made an adverse report or order, to apply to said commission, either for the purpose of showing error, or presenting newly discovered evidence, or asking for a rehearing.

Respondents admit that none of the defendants to said petition filed before said commission, and that none of their receivers, or successors in operation, have filed or presented to said commission any application or petition for the rehearing of said matters, or any of them, or moved in any form, or taken any steps whatsoever, to vacate, set aside, alter, modify, or change said so-called findings of fact, conclusions, order, or notice.

Respondents are advised and insist that said report of findings and conclusions, and said order and notice, being illegal and void,

are of no effect, and therefore that the law does not contemplate that any application or motion shall be made to the commission to set aside its own void order.

9. Respondents admit that after said report and so-called findings of fact and conclusions of said commission were filed, and its said order was made and entered as aforesaid, and on, and prior, and after the days that said report and said order and notice were delivered to the parties to the petition before said commission, the defendants to said petition, their receivers and their successors, did have, publish, keep in effect, and charge certain rates for the transportation of the kinds and classes of freight mentioned in said report and order, between the points mentioned and referred to in said report and order, which charges were, and are the same complained of in said petition filed before said commission, to wit: 28 cents per hundred pounds on hay, from Memphis, Tennessee, to Summerville, South Carolina; that said charges were, and have been made, for the transportation of hay or other commodities of the same kind or class of freight, from Memphis to Chattanooga, over the Memphis and Charleston railroad; from Chattanooga to Atlanta, over the East Tennessee, Virginia and Georgia railway; from Atlanta to Augusta, over the Georgia railroad; and from Augusta to Summerville, over the South Carolina railway. The Memphis and Charleston railroad was controlled by the East Tennessee, Virginia and Georgia Railway Company, through ownership of the majority of the capital stock; the Georgia railroad was operated by the Louisville and Nashville Railroad Company and the Central Railroad and Banking Company of Georgia, through its receiver, H. M. Comer, as assignees of the lessee; the South Carolina railway
32 was operated by its receiver, Daniel H. Chamberlain; the East Tennessee, Virginia and Georgia railway was operated by its receivers, Samuel Spencer, Henry Fink, and Charles M. McGhee. In no respect, other than as just stated, were any two of the defendants to the petition filed before said commission under any common control or management, for continuous carriage or shipment of passengers or property, by railroad or otherwise, between points in the State of Tennessee and points in the State of South Carolina, or between any other points. No two of the defendants to said petition filed before said commission, were under any common arrangement or agreement for the continuous carriage or shipment of passengers or property, by railroad or otherwise, between points in the State of Tennessee and points in the State of South Carolina, except that, for instance, said defendants to said petition had agreed upon a through rate of 28 cents per hundred pounds, from Memphis, Tenn., to Charleston, S. C., on hay and other commodities of the same kind and class of freight; the Memphis and Charleston Railroad Company, or its receivers when accepting freight at Memphis destined, say, to Summerville, S. C., would issue its bill of lading, and guaranty to the shipper that the total rate from Memphis to Summerville should not exceed the sum of the through rate from Memphis to Charleston, added to the local rate of the South Carolina Railway Company, from Charleston to Sum-

merville; and the carriers whose roads lay east of the eastern terminus of the Memphis and Charleston railroad would accept such shipment at their respective western termini, and carry the same over their respective roads, as one continuous shipment; each of said carriers demanding and receiving its proportion of the through rate from Memphis to Charleston, and the South Carolina Railway Company, or its receiver, receiving, in addition to its proportion of said through rate, its local rate from Charleston to Summerville.

10. Respondents admit that the through rate or charge maintained from Memphis, Tenn., to Charleston, S. C., is 19 cents per hundred pounds on hay; and that by adding thereto the local rate of the South Carolina Railway Company, of 9 cents per hundred pounds from Charleston to Summerville, the combination rate from Memphis to Summerville is 28 cents per hundred pounds; but they deny that said aggregate or combination rate of 28 cents per hundred pounds is either unreasonable or oppressive; on the contrary, they aver that it is just and reasonable.

11. Respondents admit that they have established and now maintain the said rates which they were by said order and notice of said commission, on or before July 15, 1894, notified and required wholly to cease and desist from charging, demanding, collecting or receiving.

Respondents admit that they, and each of them, did wilfully violate, disobey, disregard and wholly neglect and refuse to comply with the provisions and requirements of said order, and that they have continued, and do still continue, to wilfully violate, disobey,
33 disregard and wholly neglect and refuse to comply with the provisions of said order, and each and every requirement thereof, at Summerville, in the State of South Carolina, and at many other points on the several lines of roads operated by respondents. The reason why respondents have disregarded and refused to comply with the provisions and requirements of said order is because said order is illegal and void.

12. Respondents aver that Summerville, S. C., is situated on the South Carolina railroad one hundred and seventeen miles east of Augusta, and twenty-one miles west of Charleston. It has a population of about 2,200. It is not situated on any water-course, and has no railroad except the South Carolina railroad. There is no competition between carriers existing at that point.

13. Respondents aver that H. W. Behlmer, who filed said petition before said commission, and who filed the petition in this case in this court, carries on a wholesale hay and grain business in Summerville, S. C.; that he ordered, through his agents, F. D. C. Kracke's Sons, who do business in Charleston, S. C., the two car-loads of hay, to be shipped from Memphis, Tenn., to Summerville, the freight upon which was the subject-matter of complaint in the said petition, filed by him before said commission.

14. Respondents aver that said hay was carried over the Memphis and Charleston railroad, from Memphis to Chattanooga, a distance of 310 miles, over the East Tennessee, Virginia and Georgia railway from Chattanooga to Atlanta, a distance of 152 miles; over the

Georgia railroad from Atlanta to Augusta, a distance of 171 miles, and over the South Carolina railroad, from Augusta to Summerville, a distance of 117 miles. The total distance from Memphis to Summerville, via that route, is 750 miles. The total rate charged for transporting said hay from Memphis to Summerville was 28 cents per 100 pounds.

15. Respondents aver that the law of the State of Georgia authorizes and requires the railroad commission of that State "to make reasonable and just rates," to be observed by all the railroads of that State. Said commission has adopted and published a standard tariff, which is a scale of freight rates to be charged by railroads in Georgia. Said scale runs from one to four hundred and sixty miles. Said rates increase with the distance, but not in exact proportion with the distance. If said scale of rates were carried forward to seven hundred and fifty miles (the distance from Memphis to Summerville), a rate on hay of 31 cents per 100 pounds, for 750 miles, would result; which is 3 cents per 100 pounds more than the rate actually charged from Memphis to Summerville.

16. Respondents aver that the law of the State of South Carolina authorizes and requires the railroad commission of that State "to make reasonable and just rates," to be observed by all the railroads in that State. Said commission has adopted and published a standard tariff, which is a scale of freight rates to be charged by railroads in South Carolina. Said scale runs from one to three hundred and fifty miles. Said rates increase with the distance, but not in exact proportion with the distance. If said scale of rates were carried forward to 750 miles (the distance from Mem-
34 phis to Summerville), a rate on hay of 35 cents per 100 pounds, for 750 miles, would result, which is 7 cents per 100 pounds more than the rate actually charged from Memphis to Summerville.

17. Respondents aver that a rate of 28 cents per 100 pounds, for transportation by railroad a distance of 750 miles, in the territory south of the Ohio and east of the Mississippi rivers, is reasonably low, as compared with the rates usually charged for such transportation by the railroads in that section of the country.

18. Respondents aver that the rate charged by wagons for transportation in the States of South Carolina and Georgia is $1 per 100 pounds per hundred miles; and therefore respondents aver that the rate of 28 cents per 100 pounds for transportation of hay from Memphis to Summerville, is reasonably low, as compared with the rates usually charged for transportation by wagons, in that section of the country.

19. Respondents aver that the rate of 28 cents per 100 pounds on hay, from Memphis to Summerville, is just and reasonable, as compared with any known mode of land transportation, and is not unjust or unreasonably high, for the service rendered.

20. Respondents aver that the said Memphis and Charleston Railroad Company and its said receivers; the said East Tennessee, Virginia and Georgia Railway Company and its receivers; the said Louisville and Nashville Railroad Company, and the said Central

Railroad and Banking Company of Georgia (by its said receiver); and the said South Carolina Railway Company and its receiver, unite in forming a through route or line from Memphis, Tenn., via Chattanooga, Atlanta and Augusta, to Charleston, S. C.; and they unite in making and charging certain joint through rates on freight, from Memphis to Charleston. Their joint through rate on hay, from Memphis to Charleston, is 19 cents per 100 pounds. The distance from Memphis to Charleston, by said several roads, is 771 miles.

21. Respondents aver that said Memphis and Charleston railroad (an initial road at Memphis) and its connections; said Louisville and Nashville railroad (another initial road at Memphis), and its connections; the Kansas City, Memphis and Birmingham railroad (another initial road at Memphis), and its connections; and the Illinois Central railroad (another initial road at Memphis), and its connections, actively compete, at agreed rates, for through traffic between Memphis and Charleston.

Respondents aver that no two of said initial roads at Memphis are under any joint or common control, management, or arrangement, for the continuous transportation of freight or passengers.

Said initial roads at Memphis, and their respective connections, have been forced to agree upon said through rate of 19 cents per 100 pounds, from Memphis to Charleston, by reason not only of the active competition existing among themselves, but also by reason of active competition existing between said initial roads and their respective connections, on the one hand, and other carriers by rail and by water, engaged in carrying hay to Charleston from
35 cities other than Memphis, many of which latter carriers are not subject to the act to regulate commerce.

22. Respondents aver that said joint through rate of 19 cents per 100 pounds on hay, from Memphis to Charleston, is divided as follows:

The Memphis and Charleston R. R. Co. receives	7.2 cents.
The E. T., V. and G. R. R. Co. receives	3.2 cents.
The Georgia railroad receives	3.9 cents.
The Augusta transfer receives	1.5 cents.
The South Carolina Railway Co. receives	3.2 cents.
Total	19.0 cents.

23. Respondents further aver that from Augusta to Charleston there are two lines of railroad actively competing with each other, viz:

1st. The South Carolina railway, by which the distance from Augusta to Charleston is 138 miles.

2nd. The Port Royal and Augusta railroad, in connection with the Charleston and Savannah railroad, by which line the distance from Augusta to Charleston is 148 miles.

The last-mentioned line will accept, at Augusta, traffic coming from Memphis, destined to Charleston, and carry it from Augusta to Charleston at the same proportion of the joint through rate from

Memphis to Charleston as is accepted by the South Carolina railway; which proportion, on hay, is as shown above, 3.2 cents per 100 pounds.

24. Respondents aver that it is 21 miles from Charleston to Summerville. The local rate charged by the South Carolina railway, on hay, from Charleston to Summerville is 9 cents per 100 pounds. The standard tariff of the South Carolina railroad commission, referred to above, allows the railroads of that State to charge, on hay, a rate of 9 cents per hundred pounds, for a distance of 21 miles: and said tariff was adopted, as stated above, under a law of that State, which authorized and required said commission to make just and reasonable rates.

Respondents aver that said rate of 9 cents per 100 pounds for transporting hay a distance of 21 miles by railroad in South Carolina, is just and reasonable for the service rendered; that it is just and reasonable, as compared with the rates charged by other railroads in that section of the country; that it is much lower than rates charged by wagons in that section of the country, and much lower than the rates charged by any other known mode of land transportation.

25. Respondents aver that the rate of 28 cents per 100 pounds on hay, from Memphis to Summerville, is, as stated above, a combination rate; that it is arrived at by taking the joint through rate of 19 cents per 100 pounds from Memphis to Charleston, and adding thereto the local rate of the South Carolina railroad of 9 cents per 100 pounds from Charleston to Summerville, thus making a
36 total combination rate of 28 cents per 100 pounds from Memphia via Charleston, to Summerville.

Respondent companies, whose respective roads lie west of Augusta, could have delivered the hay of petitioner, Behlmer, to the Port Royal and Augusta railroad at Augusta. It would then have been carried by that road, and its connection, the Charleston and Savannah railroad, to Charleston, for their proportion (*i. e.*, 3.2 cents per 100 pounds) of the joint through rate (19 cents) from Memphis to Charleston. From Charleston it would have been carried to Summerville by the South Carolina railway at 9 cents; making the total rate from Memphis via Charleston to Summerville, 28 cents per 100 pounds, which is exactly the rate which was charged to said Behlmer, and for which he made complaint.

The route from Memphis to Charleston via the Port Royal and Augusta railroad and its connection, the Charleston and Savannah railroad, is only ten miles longer than the route via the South Carolina railroad.

If the order made by the commission in this case shall be enforced, the respondent companies, whose respective roads lie west of Augusta, will be forced either to withdraw from competition between Memphis and Charleston, or to deliver traffic to the Port Royal and Augusta railroad, at Augusta, when destined to local stations on the South Carolina railway, and to deliver traffic to the South Carolina railway, at Augusta, when destined to local stations on the Charleston and Savannah railroad, or the Port Royal and

Augusta railroad. In the latter event all the traffic to any of said local stations will pass through Charleston, and will be charged local rates from Charleston to destination. The result will be that shippers will pay the same rate as now from Memphis to destination, and the traffic will be subjected to the danger and delay occasioned by the unnecessary distance over which it will have to be hauled. Neither the shippers nor the railroads will be benefitted by such an arrangement, but on the contrary, all of them will be injured thereby.

26. Respondents aver that they have never made or issued any joint through tariff of rates from Memphis to Summerville, and have never formed any through line, or route, from Memphis to Summerville. If the said Memphis and Charleston Railroad Company should undertake to guaranty a total rate from Memphis to Summerville, less than 28 cents per 100 pounds on hay, it would be a contract of its own making, for which the other respondents would not be in anywise responsible; they would insist upon their proper respective proportions of the joint through rate of 19 cents per 100 pounds on hay, from Memphis to Charleston, and the South Carolina Railway Company would insist upon its local rate of 9 cents per 100 pounds, from Charleston to Summerville, in addition to its proportion of said through rate, and such loss as might ensue from the rate guaranteed by the Memphis and Charleston Railroad Company, would fall upon that company alone.

27. Respondents aver that the proportions which the respondent companies, whose roads lie west of Augusta, receive of the
37 rate charged on hay shipped from Memphis to Summerville, are the proportions to which they are respectively entitled of the joint through rate charged on hay shipped from Memphis to Charleston (*i. e.*, 19 cents per 100 pounds). They do not participate at all in the local rate of 9 cents per 100 pounds, charged by the South Carolina railway, from Charleston to Summerville, and it is a matter of no consequence to them whether hay, shipped from Memphis, stops at Summerville, or goes on to Charleston.

28. Respondents aver that the respondent companies whose roads lie west of Augusta, charge a joint through rate of 23 cents per 100 pounds on hay, from Memphis to Augusta, for points beyond. Said rate includes a transfer charge at Augusta.

The South Carolina Railway Company charges a local rate of 15 cents per 100 pounds on hay, from Augusta to Summerville; which rate is less than the rate allowed to be charged by said standard tariff of the South Carolina railroad commission.

If the said Behlmer had been charged the joint through rate from Memphis to Augusta (23 cents per 100 pounds) and also the local rate of the South Carolina railway, from Augusta to Summerville (15 cents per 100 pounds), the total charge from Memphis to Summerville would have been 38 cents per 100 pounds. But the said Behlmer, by getting the benefit of the joint through rate from Memphis to Charleston (19 cents per 100 pounds), and the local rate of the South Carolina railway, from Charleston to Summerville (9

cents per 100 pounds), secured a total rate from Memphis to Summerville of only 28 cents per 100 pounds.

29. Respondents aver that the joint through rate, from Memphis to Charleston, of 19 cents per 100 pounds on hay, pays to each of the carriers engaged in its transportation, a small profit over the additional cost incurred by them respectively in its transportation, but that said rate is so low it would be impossible for said carriers to reduce their respective local rates on hay, to the proportions which they respectively receive, of said through rate; and to require them to do so would be to compel them to carry hay, and other commodities of the same kind and class of freight, at less than it actually cost them to carry it.

30. Respondents aver that for the year ending June 30th, 1892, the estimated average cost of hauling all kinds of freight over said South Carolina railway, was 7.38 mills per ton per mile; that a locomotive engine can haul from 33 to 35 cars from Augusta to Charleston; that the average number of freight cars which were hauled in trains, over this railway, was 28; that the average number of loaded freight cars in a train was 16, and the average number of empty freight cars was 12; that the average number of tons freight, in each loaded car, was 6.40; and that an average of from 5 to 7 loaded freight cars could have been hauled in trains over said railway, in addition to the average number of cars actually hauled in said trains, with no additional cost for train crews, and with but little additional cost for fuel, water, waste and wear and tear of cars and track.

31. Respondents aver that the proportion which said South Carolina Railway Company, or its receiver, receives of said joint
38 through rate, from Memphis to Charleston, of 19 cents per 100 pounds, on hay, is equal to 4.6 mills per ton per mile; that while said rate yields a slight profit over the additional cost incurred by said railway in transporting full loaded cars of hay, over its entire line from Augusta to Charleston, the estimated cost of carrying one ton of freight one mile upon said road, for said year, was 7.38 mills; and if said railway were required to carry all of its freight at 4.6 mills per ton, per mile, said railway could not pay its own expenses, but, on the contrary, would sustain an aggregate loss, per annum, of $206,584.68.

32. Respondents aver that hay is shipped to Charleston, S. C., from Chicago, St. Louis, East St. Louis, Cincinnati, Louisville, Jeffersonville, Evansville, Henderson, Paducah, Cairo, East Cairo, Belmont, Columbus, and Memphis; also from Boston, New York, Philadelphia, Baltimore, Norfolk, etc.

The all-rail rate on class D (Southern Railway and Steamship Association classification), which includes hay, from Chicago to Charleston, via Ohio River points, is 33 cents per 100 pounds. The all-rail rate on hay, from St. Louis and East St. Louis to Charleston, is 28 cents per 100 pounds; or 5 cents per 100 pounds less than the all-rail rate from Chicago to Charleston.

The all-rail rate on hay, from Cincinnati, Louisville, Jeffersonville, Evansville, Henderson, Paducah, Cairo, East Cairo, Belmont,

and Columbus, to Charleston, is 23 cents per 100 pounds; or 10 cents per 100 pounds less than the all-rail rate from Chicago to Charleston.

The all-rail rate on hay from Memphis to Charleston is 19 cents per 100 pounds; or 14 cents per 100 pounds less than the all-rail rate from Chicago to Charleston.

Active competition has existed for many years between Chicago, and the above-named cities on the Mississippi and Ohio rivers, in the sale of hay and other farm products, in Charleston, and other southeastern cities. A rate on hay, by lake and canal, can be obtained from Chicago to New York, of 12 cents per 100 pounds; and by ocean from New York to Charleston, of 8 cents per 100 pounds, making a total water rate, from Chicago, via New York, to Charleston, of 20 cents per 100 pounds. The rail and water rate from Chicago to Baltimore is 12 cents per 100 pounds. The schooner rate from Baltimore to Charleston is 4 cents per 100 pounds; making a total rail and water rate, on hay, from Chicago, via Baltimore, to Charleston, of only 16 cents per 100 pounds.

33. Active competition has existed for many years between Chicago, and the above-named cities on the Mississippi and Ohio rivers; and said cities on the Mississippi and Ohio rivers have been in active competition as between themselves, in the sale of hay and other farm products, in Charleston and other southeastern cities.

The competition which has existed between said cities, and the competition which has existed between the all-rail lines which serve them, resulted many years ago in establishing certain relations between the all-rail rates which should obtain from those cities
39 respectively, to Charleston and other southeastern cities. The relation between said all-rail rates as they now exist, is as stated above; and, with some modification from time to time, such relation has existed for a long period of time; and to change said relation in the case of one of said cities, as, for instance, by raising the all-rail rates from Memphis to Charleston, without raising the all — rates from said other cities to Charleston, would inflict great injury upon the commerce of Memphis, and upon the rail lines serving that city. The traffic for Charleston would move by rail lines leading from those cities whose all-rail rates had not been raised, or from Chicago by water, and the rail lines leading from Memphis would be deprived of the opportunity to compete for the traffic.

The ocean rate, via the Clyde Steamship Company, on hay, from Boston to Charleston, is 20 cents per 100 pounds.

The ocean rate, via the Clyde Steamship Company, on hay, from New York and Philadelphia, to Charleston, is 14 cents per 100 pounds; in fact a rate of 8 cents per 100 pounds, from New York to Charleston, has been and can be obtained.

The rail and water rate, on hay, from Baltimore to Charleston, is 17 cents per 100 pounds; and the schooner rate, on hay, from Baltimore to Charleston, is about 4 cents per 100 pounds.

Frequently cargoes of grain (which take the same rate as hay) are shipped to Charleston, from Norfolk, Va., and other Virginia ports,

at such low rates as to enable the consignees of such cargoes to undersell, in the Charleston market, those who buy grain and hay in the West, and ship it to Charleston via Memphis or other points on the Mississippi and Ohio rivers.

If respondents' rates on hay and grain, from Memphis to Charleston, should be raised from 19 to 25, or even to 23 cents per 100 pounds, hay and grain could not be shipped from Memphis to Charleston. They would be shipped from New York and other north Atlantic and Virginia ports to Charleston.

The rate on hay, from Memphis to Charleston, was reduced from 23 cents to 19 cents per 100 pounds, in August, 1891; and said reduction was forced upon the carriers operating between Memphis and Charleston by the low rail and water rates which then obtained through and from New York and other north Atlantic and Virginia ports; and if the all-rail lines, operating between Memphis and Charleston should now raise the rate on hay to 28 cents per 100 pounds, or even to 23 cents per 100 pounds, from Memphis to Charleston, they would lose the traffic entirely, as it would return to said water lines, or to said rail and water lines.

34. Respondents aver that at the time the testimony in this case was taken before the commission, the price of hay in New York was $15.00 per ton, as compared with $12.70 per ton, in Memphis.

The ocean rate on hay from New York to Charleston was from $1.60 to $2.80 per ton; and the rate on hay from Memphis to Charleston, via respondents' line, was $3.80 per ton. Hay purchased at New York, with freight added, would cost, delivered at Charleston, from $16.60 to $17.80 per ton, depending upon
40 the ocean rate that happened to obtain at the time. Hay purchased at Memphis, with freight added, would cost, delivered at Charleston, $16.50 per ton.

35. The cities of Boston, New York, Philadelphia, Baltimore, Norfolk, etc., compete with each other, and also with Chicago, and also with the above-named cities on the Ohio and Mississippi rivers, in the sale of hay, grain, etc., in Charleston and other southeastern cities.

The rail lines, the water lines, and the rail and water lines, running from Boston, New York, Philadelphia, Baltimore, Norfolk, etc., compete with each other, and also with the various lines of transportation running from Chicago, and also with the various lines of transportation running from the above-named cities on the Ohio and Mississippi rivers, including Memphis, in the carriage of hay, grain, etc., to Charleston and other southeastern cities.

And the rates which respondents can obtain on hay, from Memphis to Charleston, are controlled by the rates offered by their competitors.

Respondents having fully answered, pray to be hence dismissed, with their reasonable costs in this behalf expended, and that the restraining order, which was heretofore granted in this case, with-

out notice to either of them, be rescinded and set aside, as in duty bound they will ever pray, etc.

BRAWLEY & BARNWELL,
Solicitors for the South Carolina Railway Co. and D. H. Chamberlain, Receiver.

W. A. HENDERSON,
Solicitor for the Memphis and Charleston Railroad Co., the East Tennessee, Virginia and Georgia Railway Co., and Samuel Spencer, Henry Fink, and Charles M. McGhee, Receivers.

JOS. B. CUMMING,
ED. BAXTER,
Solicitors for the Louisville and Nashville Railroad Co. and Central Railroad and Banking Co. of Georgia, as Assignees of the Lessee of the Georgia Railroad, and H. M. Comer, Receiver.

To this answer, filed respectively on the 21st and 22d of November, 1894, and the 1st of December, 1894, the following affidavits are appended:

STATE OF GEORGIA, }
Richmond County. }

Personally appeared before me, Wm. Lyon Martin, duly appointed, commissioned and qualified, in and for the State and county aforesaid, Hugh M. Comer, who is personally known to me to be the receiver of the railroads of The Central Railroad and Banking Company, one of the above-named respondents, and he, being duly sworn, deposed that the facts stated in the foregoing answer as of respondent's own knowledge are true, and that
41 those stated as upon information are true, to the best of his knowledge, information, remembrance and belief.

HUGH M. COMER,
Receiver of the Central R. R. and Banking Co.

Sworn to and subscribed before me, this 20th day of November, 1894.

WM. LYON MARTIN,
[SEAL.] *Notary Public, Richmond County, Ga.*

STATE OF GEORGIA, }
Richmond County. }

Personally appeared before me, a notary public, duly appointed, commissioned and qualified, in and for the State and county aforesaid, Thomas K. Scott, who is personally known to me to be general manager of the Georgia Railroad Company, and he being duly sworn, deposed that he had read the foregoing answer, and that the facts stated therein as of deponent's own knowledge are true, and that those stated as upon information are true, to the best of his knowledge, information, remembrance and belief.

THOS. K. SCOTT,
Gen'l Manager Georgia R. R. Co.

Sworn to and subscribed before me, this 20th day of November, 1894.

WM. LYON MARTIN,
[SEAL.] *Notary Public, Richmond County, Ga.*

STATE OF NEW YORK, }
City and County of New York. }

Personally appeared before me, Simon F. Sullivan, a notary public, duly qualified to act in and for the State, city and county aforesaid, Charles M. McGhee and Henry Fink, who are personally known to me to be the receivers of The Memphis and Charleston Railroad Company, one of the above-named respondents, and they being duly sworn, deposed that the facts stated in the foregoing answer as of their own knowledge are true, and that those stated as upon information are true to the best of their knowledge, information, remembrance and belief.

C. M. McGHEE.
HENRY FINK.

Witness my hand and notarial seal this 22d day of November, A. D. 1894.

S. F. SULLIVAN,
[SEAL.] *Notary Public, Kings County.*

Certificate filed in New York county.

STATE OF KENTUCKY, }
County of Jefferson. }

Personally appeared before me, G. W. B. Olmstead, a notary public, duly appointed, commissioned and qualified in and
42 for the State and county aforesaid, Stuart R. Knott, who is personally known to me to be the first vice-president of The Louisville and Nashville Railroad Company, one of the above-named respondents, and he being duly sworn, deposed that the facts stated in the foregoing answer as of respondent's own knowledge are true, and that those stated as upon information are true, to the best of his knowledge, information, remembrance and belief; and as testimony that the foregoing is the answer of said company, he affixed thereto the corporate seal of said company in my presence.

[CORPORATE SEAL.] S. R. KNOTT,
Vice-President L. & N. R. R. Co.
Attest: F. ELLIS,
Secretary L. & N. R. R. Co.

Witness my hand and notarial seal of office this 19th day of November, A. D. 1894. My commission expires January 5th, 1898.

[NOTARIAL SEAL.] G. B. W. OLMSTEAD,
Notary Public.

Order Dissolving Temporary Injunction.

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. In Equity.

H. W. BEHLMER
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD ET AL.

On motion of Edward Baxter and Jos. W. Barnwell, counsel for respondents in this case, it is—

Ordered, that the temporary injunction granted in this case, on the 2d day of November, 1894, against the defendants therein named, be set aside, without prejudice to the rights of the petitioner on the hearing of the cause.

CHARLES H. SIMONTON,
Circuit Judge.

Filed November 21st, 1894.

The Separate Answer of the South Carolina and Georgia Railroad Company.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit.

The separate answer of the South Carolina and Georgia Railroad Company to the petition filed by H. W. Behlmer against this respondent and others in the circuit court of the United States for the district aforesaid, in equity.

43 This respondent now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said petition contained for answer thereto or to so much thereof as this respondent is advised is material or necessary for it to make answer to, answering says:

1. Respondent admits that H. W. Behlmer, the petitioner in this case, is a citizen and resident of the town of Summerville, in the State of South Carolina and that this respondent is a corporation existing under and by virtue of the laws of the said State of South Carolina and that this respondent now owns, controls and operates the railway formerly operated by the South Carolina Railway Company, but this respondent has so owned said railway only since the twelfth day of May, 1894, since which time it has been a common carrier engaged in the transportation of passengers and freight wholly by railroad together with one or more of its co-respondents

between points in different States of the United States and respondent admits that it has transported freight which it is informed and believes came from Memphis, Tennessee, to Summerville in the State of South Carolina.

2. This respondent denies that it has heretofore been impleaded either by itself or with other common carriers before the Interstate Commerce Commission as alleged in said petition and this respondent further says that at the time when said original petition was filed by H. W. Behlmer before the Interstate Commerce Commission, and at the time the proof was taken thereon, and at the time when the issues made under said petition were heard, this respondent was not in existence. And this respondent submits that the proceedings had upon said original petition and the findings and orders made thereupon by said commission do not bind nor affect this respondent in any way whatsoever; it was not before said commission in any way or for any purpose whatever. That the railway and property of the South Carolina Railway Company under the order and decree of this court were sold on the twelfth day of April, 1894, to Gustave E. Kissel and others and the sale thereof having been confirmed by this court on the twenty-fourth day of April in said year a conveyance of the said railway and the property of said company was made to said Gustave E. Kissell and others on the first day of May in said year, by the special master of this court and said Kissell and others on the twelfth day of May in said year, conveyed the same to this respondent and this respondent denies that any order and notice from the said Interstate Commerce Commission directing this respondent to do or abstain from doing anything whatever has ever been served upon this respondent. And this respondent is not bound by any of the proceedings referred to in the petition herein as having taken place before said Interstate Commerce Commission.

3. This respondent although it is advised that it is not bound to make further answer to the petition in this cause, yet further submits that it is informed and believes that the joint and several answer filed by its codefendant The Louisville and Nashville
44 Railroad Company and others truly and correctly states the facts relating to the proceedings had upon said original petition filed by the said petitioner before said Interstate Commerce Commission and also the facts relating and pertaining to the matters and things alleged and averred in said original petition, and therefore this respondent if required to make further answer to the statements contained in the present petition relies upon the facts and statements contained in the aforesaid answer of its said co-respondents as fully as if the same were repeated and set out herein.

4. And this respondent having fully answered prays to be hence dismissed with its reasonable costs in this behalf sustained, and it will ever pray and so forth.

JOS. W. BARNWELL,
Respondents' Solicitor.

UNITED STATES OF AMERICA,
State of South Carolina.

Personally appeared before me E. S. Bowen, who being duly sworn says that he is an officer and agent of the above-named corporation, the South Carolina and Georgia Railroad Company, to wit: the general manager thereof, and that the matters and things therein stated, so far as they are derived from his own knowledge, are true, and so far as they depend upon the information of others he believes them to be true.

E. S. BOWEN.

Sworn to before me this eighth day of January, 1896.

W. TURNER LOGAN,
Notary Public.

Filed January 14, 1896.

The Separate Answer of the Southern Railway Company.

Circuit Court of the United States for the District of South Carolina.

H. W. BEHLMER
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL.

The separate answer of the Southern Railway Company to the petition filed by H. W. Behlmer against this respondent and others in the circuit court of the United States for the district of South Carolina, in equity.

This respondent now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said petition contained, for answer thereto, or to so much as this respondent is advised is material or necessary for it to make answer to, answering says:

45 1. Respondent admits that H. W. Behlmer, the petitioner in this case, is a citizen and resident of the town of Summerville, in the State of South Carolina; that this respondent, The Southern Railway Company, is a corporation created, chartered and existing under and by virtue of the laws of the State of Virginia, and having its principal office at Washington, in the District of Columbia; that this respondent now owns, controls and operates the railways formerly owned and operated by the East Tennessee, Virginia and Georgia Railway Company, but has so owned said railways only since the 14th day of July, 1894, and has operated them only since the first day of August, 1894, since which last-named date it has been a common carrier engaged in the transportation of passengers and freight wholly by railroad, together with one or more of its co-respondents, between points in different States of the United States, and particularly from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina; but as

to whether this respondent as such common carrier, so engaged in transportation as aforesaid, has been since said first day of August, 1894, — is now subject to any provisions of an act of Congress of the United States, entitled An act to regulate commerce, approved February 4th, 1887, or to the provisions of any of the amendments of said act, is a question which, if material, is respectfully submitted to the consideration of the court.

2. Respondent denies that it has heretofore, on the 29th day of December, 1892, or on any other day duly impleaded either by itself or with other common carriers, before the Interstate Commerce Commission, as alleged in said petition. At the time said original petition was filed by H. W. Behlmer before the Interstate Commerce Commission, and at the time the proof was taken thereon, and at the time the issues made upon said petition were heard, this respondent was not even in existence. And the proceedings had upon said original petition, and the findings and orders made thereupon by said commission do not bind or affect this respondent in any way whatsoever, because it was not before said commission, in any way or for any purpose whatever. The railways and property of the East Tennessee, Virginia and Georgia Railway Company were afterwards, under orders and decrees of the United States circuit court for the eastern district of Tennessee, and in the States of Georgia, Alabama and Mississippi put up at public sale to the highest bidder, and were bid off by this respondent, and on, to wit: July 14th, 1894, and subsequent days prior to August 1st, 1894, said sale to this respondent was confirmed by said courts, and until said confirmation this respondent had no right in or control over said railway and properties or any part thereof.

Afterwards, to wit, on the first day of August, 1894, this respondent came into possession of said railways and properties formerly owned by said East Tennessee, Virginia and Georgia Railway Company, and since that date, and not before, has been controlling and operating the same. This respondent simply became the
46 purchaser of said railways and properties as any other purchaser would have done, and in no way became responsible for any of the supposed or real wrongs, omissions or mistakes of the former owners, and it respectfully insists that it is now in no way answerable therefor, if any such exist. And this respondent is advised and insists that it is not bound by any of the proceedings had upon the petition of H. W. Behlmer before said Interstate Commerce Commission.

3. This respondent is advised and insists that it is not bound by the law and by the practice of this court to make further answer to the petition in this cause, but if mistaken in this position and not otherwise, then this respondent for further answer says: It is informed and believes that the joint and several answer filed in this cause by its codefendants, The Louisville and Nashville Railroad Company, The East Tennessee, Virginia and Georgia Railway Company, and others, truly and correctly states the facts relating to the proceedings had upon said original petition filed by the aforesaid petitioner before said Interstate Commerce Commission, and also

the facts relating and pertaining to the matters and things alleged and averred in said original petition; and therefore, if compelled by law to make answer to the statements contained in the present relating thereto, this respondent relies upon the facts and statements contained in the aforesaid answer of its said co-respondents as fully as if the same were repeated and set out herein.

4. And this respondent having now fully answered, prays to be hence dismissed with its reasonable costs in this behalf expended, and that the restraining order that was heretofore granted in this case without notice to this respondent be rescinded and set aside; and as in duty bound, it will ever pray, &c.

W. A. HENDERSON,
A. G. C. for Southern Railway Company.

STATE OF NEW YORK, }
City and County of New York. }

Personally appeared before me Simon F. Sullivan, a notary public, duly appointed, commissioned and qualified, in and for the State and county aforesaid, Samuel Spencer, who is personally known to me to be the president of The Southern Railway Company, the above-named respondent, and he, being duly sworn, deposed that the facts stated in the foregoing answer, as of respondent's own knowledge are true, and that those stated as upon information are true to the best of his knowledge, information, remembrance and belief; and in testimony that the foregoing is the answer of said company, he had affixed thereto the corporate seal of said company, in my presence.

[SEAL.] SAMUEL SPENCER,
President Southern Railway Company.

Witness my hand and notarial seal of office, this 28th day of December, A. D. 1894.

[SEAL.] S. F. SULLIVAN,
Notary Public, Kings County.

Certificates filed in New York county, New York.
Filed 1st January, 1895.

47 *Replication of H. W. Behlmer.*

UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit. In Equity.

H. W. BEHLMER
vs.
THE LOUISVILLE AND NASHVILLE R. R. CO. ET AL. }

Replication of H. W. Behlmer.

In this case the defendants, The Louisville and Nashville Railroad Company, The Central Railroad and Banking Company of

Georgia, H. M. Comer, receiver of the railroad of said last-mentioned company, The Memphis and Charleston Railroad Company, The East Tennessee, Virginia and Georgia Railway Company, Samuel Spencer, Henry Fink and Charles M. McGhee, receivers of the railroads of the said last two mentioned companies, The South Carolina Railway Company and Daniel H. Chamberlain, receiver of the railroad of said last-mentioned railway company, having filed their joint and several answers to the petition in this case, now this repliant saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendants, for replication thereunto saith that he doth and will aver, maintain and prove his said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or availed, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by his said bill he has already prayed.

CLAUDIAN B. NORTHROP,
Solicitor for Plaintiff.

Filed December 29, 1894.

Circuit Court of the United States for the District of South Carolina.

H. W. BEHLMER
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL.

In this cause, it is stipulated, and agreed by counsel, that the copy of the testimony which was taken before the Interstate
48 Commerce Commission in the case of H. W. Behlmer *vs.* The Memphis and Charleston Railroad Company *et al.*, at Charleston, S. C., on April 4, 1893, and which copy has been duly certified by Edw. A. Moseley, secretary of said commission, under date of December 14, 1894, and which is here filed as Exhibit A, and made part hereof, may be read on the hearing of this cause, as though it had been taken in this court, subject to all legal objections for incompetency or irrelevancy. Either party may have until the 15th day of April, 1895, in which to take additional testimony. Such testimony may be taken before any notary public, duly qualified, and authorized to take depositions, at the place where the same shall be taken. The depositions may be taken down upon a typewriter, or in shorthand, and afterwards typewritten, or they may be taken in longhand. Notices to take depositions, issued by defendants, may be served by leaving a copy thereof at the office of Claudian B. Northrop, Esq., Charleston, S. C., and notices to take

depositions, issued by complainant, may be served by leaving a copy thereof at the office of Hon. Jos. W. Barnwell, Charleston, S. C. It shall be sufficient notice to allow twenty-four hours to get ready, and such additional time as may be necessary to reach the place fixed in the notice, by the usual traveled route.

This 27th day of February, 1895.

CLAUDIAN B. NORTHROP,
Solicitor for Complainant.

ED. BAXTER,
Solicitor for Defendants.

Filed August 18, 1895.

"EXHIBIT A."

Testimony Taken Before Commission.

The Chairman: Well, gentlemen, are you ready to proceed?

Mr. Northrop: If your honors please, I do not think we need to offer any further proof as to the published rates. I suppose the admission of the common control, management and arrangement by the Memphis and Charleston and the East Tennessee roads will carry with it the admissions of the other roads as to the material facts. The South Carolina and Georgia roads state certain justificatory facts, first, that they are obliged to charge an unreasonably low rate to Charleston, which is produced by eight competing lines that come in here, and further that they are subject to competition by sea on hay, grain and freight of that class, originating in New York and other eastern points and further that they are subject to competition as to the same freight from Chicago via the lakes and rail and down by the coast. It seems the burden is on them to establish that. However, as the Memphis and Charleston road denies that it has a through rate to this point, we beg to submit their published tariffs—freight tariff No. 25, supplement No. 7, on page 15, shows the rate to Summerville on class D to be 28 cents. We introduce in evidence freight tariff No. 25 of the Memphis and Charleston railroad and supplements Nos. 1, 2, 3, 4, 5 and 7 to said freight tariff. On page 39 of this tariff class D is given 33 cents to Summerville and 24 cents to Charleston; supplement No. 5 to
49 said freight tariff No. 25 shows a rate on page 1 to Charleston of 19 cents; supplement No. 7, page 15, shows a rate to Summerville, class D, 28 cents. Southern Railway and Steamship R. C. circular No. 22, series 1890–1891, shows class D to be hay (see page 260); oats (see page 69); corn (see page 251); wheat (see page 284). As to the charges on these two car-loads of hay, they are admitted in the answers.

Com'r Knapp: You complain of a violation of the long and short haul clause?

Mr. Northrop: Yes, sir.

Com'r Knapp: Does your complaint extend to traffic generally, or only to some particular commodities?

Mr. Northrop: We have alleged all interstate traffic. We say:

"that all the above-mentioned lines are members of the Southern Railway and Steamship Association, and that the discrimination and excessive rates against Summerville exists not only on hay, as above set forth, but on all articles of interstate commerce coming to that place, much to the detriment and disadvantage of the town and the business of its merchants."

Com'r Knapp: Your complaint shows the location of this town and the line, etc.?

Mr. Northrop: Yes, sir.

The Chairman: Who represents the respondents?

Mr. Baxter: I appear for the Louisville and Nashville Railroad Company and the Georgia Railroad Company.

Mr. E. P. Waring (G. F. and P. A., South Carolina R'y): Mr. Barnwell represents the South Carolina Railway Company, but he has not come yet. I will find out if he is coming.

Mr. Baxter: The Louisville and Nashville Railroad Company and the Central Railroad of Georgia lease the Georgia railroad, and I represent them.

The Chairman: There is substantially but one question in the case, Mr. Baxter?

Mr. Baxter: Yes, sir.

The Chairman: Well, gentlemen, you may proceed.

Mr. Northrop: I will put Mr. Behlmer on the stand.

Freight tariff No. 25 of the Memphis and Charleston railroad and supplements Nos. 1, 2, 3, 4, 5 and 7 to said freight tariff, above referred to by Mr. Northrop, are on file in the office of the auditor of the Interstate Commerce Commission.

H. W. BEHLMER, the complainant, being duly sworn, testified as follows:

Mr. Northrop: What is your business?

Mr. Behlmer: Wholesale hay and grain.

Mr. Northrop: Do you propose to do a larger business in Summerville?

Mr. Behlmer: If I get the rate.

Mr. Northrop: In what way?

Mr. Behlmer: On car-load lots.

Mr. Northrop: And you think of going into manufacturing enterprises there?

50 Mr. Behlmer: Yes, sir.

Mr. Northrop: Why cannot you do that now?

Mr. Behlmer: The rate is too great.

Mr. Northrop: What is the rate?

Mr. Behlmer: The rate to Summerville is 28 cents a hundred on hay from Memphis, and the rate to Charleston is 19 cents.

Mr. Northrop: And the same on grain?

Mr. Behlmer: Yes, sir.

Mr. Northrop: How is the rate made up?

Mr. Behlmer: It is the rate to Charleston and the 9 cents local rate from Charleston up again.

Mr. Northrop: Hay is not taken past Summerville?
Mr. Behlmer: No, sir; it is left there.
Mr. Northrop: Are there facilities in Summerville?
Mr. Behlmer: Yes, sir.
Mr. Northrop: No trouble in switching off?
Mr. Behlmer: No, sir.
Mr. Northrop: Do you think that rate of 28 cents from Memphis to Summerville is unreasonably high?
Mr. Behlmer: That is what I think.

Mr. Northrop: That is all.

Cross-examination:

Mr. Baxter: Who did you buy your hay from?
Mr. Behlmer: F. D. C. Kracke's Sons.
Mr. Baxter: Are they merchants?
Mr. Behlmer: No, they are agents for these parties at Memphis.
Mr. Baxter: Agents for somebody?
Mr. Behlmer: They are agents for everything in that line, in the hay and grain business.
Mr. Baxter: They are located at Charleston?
Mr. Behlmer: Yes, sir.
Mr. Baxter: You ordered your hay at Charleston?
Mr. Behlmer: I ordered it through them.
Mr. Baxter: But you ordered it at Charleston to be shipped from Memphis to Summerville?
Mr. Behlmer: Yes, sir.
Mr. Baxter: Do you know where the hay shipped from the Memphis market is raised?
Mr. Behlmer: No, sir; I do not.
Mr. Baxter: Where do you expect to sell the products of the mill you expect to start?
Mr. Behlmer: In Summerville and a little higher up.
Mr. Baxter: You expect to ship it away?
Mr. Behlmer: Yes, sir.
Mr. Baxter: To what points?
Mr. Behlmer: To Georgia stations.

Mr. Baxter: That is all.

Redirect examination:

Mr. Northrop: You paid for these car-load lots of hay at Summerville?
51 Mr. Behlmer: Yes, sir.
Mr. Northrop: On a through bill from Memphis to Summerville?
Mr. Behlmer: Yes, sir.
Mr. Northrop: Over what roads?
Mr. Behlmer: The Memphis and Charleston railroad, to Chattanooga; the East Tennessee, Virginia and Georgia, from Chattanooga

to Atlanta; the Georgia railroad, from Atlanta to Augusta, and the South Carolina railway to Summerville.

Mr. Northrop: Grain comes the same way?

Mr. Behlmer: Yes, sir.

Mr. Northrop: That is all.

A. G. JACKSON, a witness on behalf of the defendants, having been duly sworn, testified as follows:

Mr. Baxter: Where do you reside?

Mr. Jackson: In Augusta.

Mr. Baxter: What road are you connected with, and how long have you been connected with it?

Mr. Jackson: The Georgia railroad; have been connected with it since April 1, 1892.

Mr. Baxter: In what capacity are you connected with it?

Mr. Jackson: As general freight and passenger agent.

Mr. Baxter: With what road, if any, were you connected with before you were connected with the Georgia railroad?

Mr. Jackson: Immediately prior to my connection with the Georgia railroad, I was connected with the Western and Atlantic railroad.

Mr. Baxter: That is a road from Chattanooga to Atlanta?

Mr. Jackson: Yes, sir.

Mr. Baxter: What was the character of your connection with the Western and Atlantic?

Mr. Jackson: I was freight agent at Atlanta.

Mr. Baxter: And prior to your connection with that road?

Mr. Jackson: I was connected with the Nashville, Chattanooga and St. Louis railroad.

Mr. Baxter: For how many years?

Mr. Jackson: About 10 years.

Mr. Baxter: In what capacity?

Mr. Jackson: Immediately prior to my connection with the Western and Atlantic I was freight auditor at Nashville.

Mr. Baxter: I wish you would state to the court whether the duties which you have been called upon to perform in the last 10 or 15 years have been such as to give you reasonable familiarity with freight tariffs in this part of the country?

Mr. Jackson: I think so. For several years I was claim agent for the Nashville, Chattanooga and St. Louis, and after that I was in charge of the rates for that road. I have had connection with traffic associations and have a general knowledge of rates.

Mr. Baxter: I understand that the Memphis and Charleston and the East Tennessee, Virginia and Georgia Railway Companies
52 are in some wise connected, so that the East Tennessee, Virginia and Georgia Railway Company has a control over the Memphis and Charleston?

Mr. Jackson: My understanding is that the East Tennessee, Virginia and Georgia Railway Company leases the Memphis and Charleston.

Mr. Baxter: Is there any control or management so far as you know, joint or otherwise, between the Memphis and Charleston, or the East Tennessee, Virginia and Georgia Railway Company, and the Georgia railroad, or the South Carolina railway?

Mr. Jackson: There is none.

Mr. Baxter: With the exception, then, of the lease of the Memphis and Charleston railroad by the East Tennessee, Virginia and Georgia railroad, I understand you to say that the defendants in this case are under no common control or management?

Mr. Jackson: There is a joint management between Memphis and Atlanta—the Memphis and Charleston and the East Tennessee, Virginia and Georgia have a joint management.

Mr. Baxter: But with that exception?

Mr. Jackson: Yes, sir.

Mr. Baxter: I will ask you to state whether the defendant companies in this case have ever issued, so far as you know or believe, any joint through tariff on hay from Memphis to Summerville, S. C.?

Mr. Jackson: Not what I understand to be a joint through tariff. There is no such tariff issued.

Mr. Baxter: My friend on the other side referred to this supplement No. 7, page 15, to freight tariff No. 25 of the Memphis and Charleston railroad. Please look at that and explain to the commission how that tariff is made up?

Mr. Jackson: I do not consider this a joint through tariff. The figures shown in this tariff are arrived at by taking the joint rates and adding to those joint rates the published locals of the South Carolina railway, which I understand to be the standard rates. It is published by the Memphis and Charleston railroad.

Mr. Baxter: And as I understand the joint through rate from Memphis to Charleston on hay is what?

Mr. Jackson: Nineteen cents.

Mr. Baxter: And the local rate of the South Carolina to Summerville is what?

Mr. Jackson: It is nine cents.

Mr. Baxter: Making what?

Mr. Jackson: Twenty-eight cents.

Mr. Baxter: What rate is quoted from Memphis to Summerville on that tariff?

Mr. Jackson: Twenty-eight cents.

Mr. Baxter: Do any other roads except the Memphis and Charleston purport to join in that tariff?

Mr. Jackson: No, sir.

Mr. Baxter: That tariff is a publication by the Memphis and Charleston Railroad Company alone, on its own responsibility without consulting any of the other defendants?

53 Mr. Jackson: Yes, sir.

Mr. Baxter: And the Memphis and Charleston arrives at that by adding the through rate to the local rate?

Mr. Jackson: Yes, sir.

Mr. Baxter: And publishes it for the information of shippers?

Mr. Jackson: Yes, sir.

Mr. Baxter: What is the difference between the proportion which the roads west of Augusta receive on hay destined to Charleston and the proportion they receive on hay destined to Summerville, from Memphis?

Mr. Jackson: There is no difference.

Mr. Baxter: It is a matter of no consequence to the Georgia railroad or any road west of Augusta whether the hay stopped at Summerville or went to Charleston?

Mr. Jackson: None whatever; it makes no difference.

Mr. Baxter: What is the through rate on hay from Memphis to Augusta?

Mr. Jackson: Twenty-three cents.

Mr. Baxter: What is the South Carolina railroad's local from Augusta to Summerville?

Mr. Jackson: Fifteen cents, I think.

Mr. Baxter: Please look and see.

Mr. Jackson: The standard tariff, I see, makes it more than fifteen cents. Fifteen cents is the rate between Augusta and Summerville.

Mr. Baxter: Then, if the defendants in this case had charged the complainant the through rate from Memphis to Augusta, and then the South Carolina had charged its local from Augusta to Summerville, the rate would have been what?

Mr. Jackson: The total would have been 38 cents.

Mr. Baxter: By charging the complainant the rate to Charleston, 19 cents, plus the local from Charleston to Summerville, 9 cents, it would make 28 cents?

Mr. Jackson: Yes, sir. We use the Augusta special, which includes the transfer and which would make the rate 39 cents. The Augusta special from Memphis is 24 cents instead of 23. That is to provide for the Augusta transfer, so it would make the total 39 cents instead of 38.

Mr. Baxter: The point of my question was this: What would have been the total rate if the defendant companies had charged the through rate from Memphis to Augusta, plus the local from Augusta to Summerville, instead of charging the through rate from Memphis to Charleston plus the local from Charleston to Summerville?

Mr. Jackson: The through rate from Memphis to Augusta proper is 23 cents. The local rate of the South Carolina from Augusta to Summerville is 15 cents. That would make a through rate of 38 cents, but it would not make a delivery from the Georgia Railroad depot to the South Carolina depot.

Mr. Baxter: I do not care about the details at Augusta.

Mr. Jackson: To the complainant it would be 39 cents.

54 Mr. Baxter: The through rate to Augusta plus the local from Augusta would be 39 cents?

Mr. Jackson: Yes, sir.

Mr. Baxter: By Charleston to Summerville he gets a total rate of 28 cents?

Mr. Jackson: Yes, sir.

Mr. Baxter: So that he gets 11 cents less rate by shipping via Charleston than by shipping via Augusta?

Mr. Jackson: I said the rate was 23 cents from Memphis to Augusta; it is 22 cents. That would make the through rate 37 cents, or 38 cents including the Augusta transfer.

Mr. Baxter: This rate of 28 cents from Memphis to Summerville is guaranteed by whom?

Mr. Jackson: If any through rate is guaranteed, it is guaranteed by the initial line, the Memphis and Charleston.

Mr. Baxter: Are the other companies in any way bound by that guarantee?

Mr. Jackson: No, sir.

Mr. Baxter: If the Memphis and Charleston railroad sees proper to guarantee a less rate than it should, upon whom does the loss fall?

Mr. Jackson: The Memphis and Charleston railroad.

Mr. Baxter: The other lines insist upon their proper proportion?

Mr. Jackson: Yes, sir.

Mr. Baxter: And the Memphis and Charleston must make it good?

Mr. Jackson: Yes, sir.

Mr. Baxter: I would like to know what all-rail lines, if any, actually compete for traffic between Memphis and Charleston?

Mr. Jackson: Initial lines?

Mr. Baxter: Yes, sir.

Mr. Jackson: The Memphis and Charleston and its connections, the Louisville and Nashville and its connections, the Kansas City, Memphis and Birmingham, and its connections, and the Illinois Central and its connections.

Mr. Baxter: Are any one of those four initial lines at Memphis in anywise controlled or managed by the others?

Mr. Jackson: No, sir.

Mr. Baxter: You say they actually compete?

Mr. Jackson: Unless you consider that the Louisville and Nashville has some control of the Georgia railroad.

Mr. Baxter: You mentioned four initial roads and did not mention the Georgia railroad. Have any of those four initial lines any control or management over the others?

Mr. Jackson: No, sir.

Mr. Baxter: You say those four lines out of Memphis actually compete for the traffic. Do you mean they offer to compete or actually carry traffic?

Mr. Jackson: Actually carry traffic.

Mr. Baxter: They all compete at agreed rates?

55 Mr. Jackson: Yes, sir.

Mr. Baxter: How are those rates agreed upon?

Mr. Jackson: They are rates that are established or made by the rate committee of the Southern Railway and Steamship Association.

Mr. Baxter: Those four initial lines are all members of that association.

Mr. Jackson: Yes, sir.

Mr. Baxter: So the way they are agreed upon is through the representatives of those four lines on the rate committee of the Southern Railway and Steamship Association?

Mr. Jackson: Yes, sir.

Mr. Baxter: Did you get any answer to your telegram of inquiry yesterday with reference to rates that can be obtained by steamboats from Memphis to New Orleans on hay?

Mr. Jackson: No, sir; I did not.

Mr. Baxter: What charter rates can be obtained on hay from New Orleans to Charleston by ocean?

Mr. Jackson: I do not know that. I could not inform you as to the charter rates on hay. I have the charter rates on other commodities.

Mr. Northrop: I wish to say that there is no notice of any such defense in the answers, and I am unprepared on that particular matter. This is the first intimation we have had as to any competition from that direction. We are wholly unprepared on that line for the reason that the pleadings did not give notice.

Mr. Baxter: My brother is correct on that, and I will have to ask the commission to allow me to amend the answer in that regard if I can succeed in making the proof. If I find I can make the proof I will amend my answer and you shall have time to make reply. I do not think there are any vessels between New Orleans and Charleston carrying hay.

Mr. Northrop: Or grain either. We gave hay as an example.

Mr. Baxter: If I got my telegrams I would be in condition to move to amend this morning, but I got no answer. I may have to abandon the whole point, but I hope to be able to show that the rate prevailing on boats from Memphis to New Orleans, plus a rate which can be secured by chartering a vessel from New Orleans, will amount to a certain sum to Charleston. I am simply throwing it out now. Yout criticism is correct.

The Chairman: A rate that can be obtained? Will that answer your purpose? Must it not be an actual competition?

Mr. Baxter: I understand your honors have gone to the length of holding that a potential competition is sufficient. I want to get the facts.

The Chairman: We want to get the facts. If there is anything they want to meet afterwards they will have an opportunity of doing it.

Mr. Baxter: I hope to be able to show the rate from Memphis to New Orleans, and then by hiring a schooner and bringing it around I hope to be able to make that point. I will pass that for
56 the present, considering that I have done enough in giving an intimation of what I want to do. Mr. Jackson, please state what rates have been obtained on hay from Chicago to Charleston via the lakes, canal and ocean?

Mr. Jackson: I have been shown an invoice in which a rate of 23 cents was granted from Chicago to Charleston.

Mr. Baxter: When the lakes are open so that those lake and canal rates can be used, what proportion of the traffic do the all-rail lines from Chicago to Charleston get?

Mr. Northrop: I do not like to interrupt my friend, but it seems to me we are here trying to get through in a hurry, and I object to this testimony on the ground that it is irrelevant. I am perfectly willing to admit, to save time, that different stuff can be brought from Chicago to Charleston, but the same hay and grain cannot be brought at less rates from Memphis. I submit that it is entirely irrelevant to the proceeding in that direction.

Mr. Baxter: The trouble is under the contention made in the Social Circle case by Mr. Safford; it was claimed that it is the duty of carriers when brought before the commission, to put in fully and fairly all the evidence they have to rely on, and that it is not treating the commission fairly and in good faith to hold back in our defence. If my testimony in court is thrown out because it was not introduced here, I am compelled to offer it here; and if I do not offer it here, the argument is, I cannot use it in court.

The Chairman: If you propose to offer it, it answers your purpose?

Mr. Baxter: Yes, sir.

The Chairman: Unless the commission should change its opinion on that question, if you did offer it, it would not do any good.

Mr. Baxter: I understand that.

The Chairman: Well, Mr. Baxter, go on with this witness and put in that testimony for what it is worth.

Com'r Knapp: The letter would be more satisfactory. Let us have that.

Mr. Baxter: I really supposed that the commission had all this information and that I was only calling attention to it in the course of my examination.

The Chairman: This claim has been made before. Not long ago somebody came before us from Memphis and insisted on the right to carry at almost any rate through here, because carrying could be done the other way.

Mr. Baxter: A part of this question is that it has actually been done; not that it is possible, but that it has been done.

Com'r Knapp: Your question did not go to that point.

Mr. Jackson: This invoice was not on hay, but on grain.

Com'r Knapp: I got the impression that you had seen a communication in which such a rate was proposed or guaranteed.

Mr. Jackson: The invoice I saw was on a shipment of corn from Chicago to Charleston, sold and delivered to the party at Charleston, and from the invoice was deducted a rate of 23 cents, and under the name of the concern the rate was shown, 23 cents
57. per hundred pounds, via the W. T. Company and Clyde Steamship Company.

Com'r Knapp: The Western Transportation Company?

Mr. Jackson: Yes, sir.

Com'r Knapp: We do not want to make any unnecessary trouble. It simply occurred to us that the letter would be a little more satisfactory, assuming that it was accessible.

Mr. Jackson: This was an invoice in an invoice book.

Com'r Knapp: Perhaps he can bring it here.

Mr. Baxter: When the lakes are open, what proportion of business from Chicago to Charleston comes by water and rail lines?

Mr. Jackson: I am not able to state the proportion of business, I can only state in a general way that the business via the all-rail lines is materially affected by that movement.

Mr. Baxter: Have you joint through freight tariff, 22 G. L., issued by the Chicago and Ohio River Tariff Association, taking effect March 16, 1892?

Mr. Jackson: Yes, sir.

Mr. Baxter: I do not care to encumber the archives of the commission. I wish the stenographer to note that the defendants put in evidence page 5 of that tariff—joint through freight tariff, 22 G. L., issued by the Chicago and Ohio River Traffic Association, taking effect March 16, 1892. Please refer to page 5, Mr. Jackson, and state what the all-rail rate on class D is from Chicago via Ohio River points to Charleston.

Mr. Jackson: Thirty-three cents.

Mr. Baxter: What is the all-rail rate on 6th class, which I understand includes hay from Chicago to New York?

Mr. Jackson: Twenty-five cents.

Mr. Baxter: What is the all-rail rate from Chicago to Baltimore on the same class?

Mr. Jackson: I am informed it is 22 cents. My recollection is that there is a differential of 3 cents on the rates from Chicago to New York and the rates from Chicago to Baltimore. I am informed it is 22 cents.

Mr. Baxter: What rates are charged by schooners from Baltimore to Charleston on class D?

Mr. Jackson: Mr. Molony stated to me distinstly yesterday that he had brought in cargoes of grain from Norfolk and Baltimore by schooner at two cents per bushel—equal to about 4 cents per hundred pounds.

Mr. Baxter: If that be so, from Chicago to Charleston via Baltimore, a rate can be obtained by rail and schooner on hay of 26 cents a hundred pounds?

Mr. Jackson: Yes, sir.

Mr. Baxter: Do you know what the rail and water rate on class D is from Chicago to Baltimore?

Mr. Jackson: I am informed they have a 12-cent rate.

Mr. Baxter: By taking the rail and water rate from Chicago to Baltimore and adding the schooner rate from Baltimore to Charleston, a rate of 16 cents on hay and grain can be obtained from Chicago to Charleston?

58 Mr. Jackson: Yes, sir.

Com'r Knapp: Will you explain the route?

Mr. Jackson: I have not a map and cannot explain the route it would take.

Mr. Baxter: I understand they use the lakes to a certain point and then rail to Baltimore.

Mr. Jackson: Yes, sir: I think that is the way.

Mr. Baxter: What is the price of hay in New York as compared with the price of hay in Memphis?

Mr. Jackson: Free on board in New York, or delivered in Charleston?

Mr. Baxter: I mean in New York.

Mr. Jackson: I get the price of hay in New York on a given date at fifteen dollars per ton; on the same date it is twelve dollars and seventy cents at Memphis.

Mr. Baxter: Give the rate from New York to Charleston via the Clyde steamship line on hay and the rate from Memphis to Charleston via defendants' lines.

Mr. Jackson: The rate from New York to Charleston via the Clyde Steamship line is $1.60 a ton, and the rate from Memphis to Charleston via defendants' lines is $3.80.

Mr. Baxter: If I understand your answers correctly, a merchant at Charleston can buy hay at New York and pay freight from there to Charleston and it will cost him here in Charleston $16.60 per ton?

Mr. Jackson: Yes, sir.

Mr. Baxter: Or he can go to Memphis and pay defendants' rates and it will cost $16.50 per ton?

Mr. Jackson: Yes, sir.

Mr. Baxter: I wish you would look at Louisville and Nashville southeastern freight tariff No. 25 S. E., taking effect August 16, 1892. I wish to put in evidence pages 2, 14, and 24 of that tariff. The tariff itself is on file with the commission and I simply call attention to the pages on which we rely as matters of evidence, constituting the rates on hay to Charleston from St. Louis, East St. Louis, Cincinnati, Louisville, Jeffersonville, Evansville, Henderson, Paducah, and Memphis, as shown by that tariff.

Mr. Jackson: From Cincinnati, Louisville, Jeffersonville, Evansville, Henderson, and Paducah, 23 cents; from St. Louis and East St. Louis, 28 cents; from Memphis, 19 cents.

Mr. Baxter: I wish also to put in evidence N. C. & St. L. southeastern freight tariff No. —, S. E.—I telegraphed for the number, but have not got an answer yet—taking effect on the — day of ——. That also I will give you as soon as I get my telegram. I want to put in evidence page 2 of that tariff. I wish, Mr. Jackson, you would give us the rates to Charleston from Cairo, East Cairo, Belmont, and Columbus, as shown by the N. C. & St. L. tariff you have.

Mr. Jackson: It is 23 cents.

Mr. Baxter: The rates from all these points to Charleston on hay is 23 cents?

59 Mr. Jackson: Yes, sir.

Mr. Baxter: I see that the rates on hay to Charleston from

Chicago bear certain relations to the rates to Charleston from St. Louis, East St. Louis, Louisville, Cairo, East Cairo, Henderson, Belmont, Columbus and Memphis. Please state what would be the effect on the business of the defendant roads if that relation should be seriously disturbed.

Mr. Jackson: The business would move eastward.

Mr. Baxter: And these defendants would be deprived of the opportunity to compete for it?

Mr. Jackson: Yes, sir.

The Chairman: What do you mean by moving eastward?

Mr. Jackson: To the north Atlantic ports—the eastern seaports.

The Chairman: You mean the grain and hay?

Mr. Jackson: Instead of finding its way into the southeast, it would find its way to the northeastern seaports, and come south by coastwise steamers.

Mr. Baxter: What is the distance from Memphis to Summerville, via defendants' route—I make it 750 miles.

Mr. Jackson: I think that is right.

Mr. Baxter: The rate from Memphis to Summerville, complained of in this case, is 28 cents a hundred pounds, a distance of 750 miles. I wish you would refer to the tariff of the Georgia railroad commission, known as its standard tariff, which you will find on pages 114 and 115 of the 20th Annual Report of the Georgia Railroad Commission. I assume that that report is also on file with the Interstate Commerce Commission. I desire to put in evidence those pages, without filing it, relying on the copy with the commission. Taking the scale of rates as adopted by the Georgia railroad commission, please state what would be a reasonable rate by extending their scale of rates to 750 miles—their rates, I think, stop at 460 miles—taking their plan of scaling the rates and carry it forward to 750 miles, and state what would be a reasonable rate according to that standard for 750 miles.

Mr. Jackson: Using their scale of rates up to 460 miles, and figuring on a reasonable scale to 750 miles, would reach a rate of 31 cents per hundred pounds.

Mr. Baxter: According to the standard of the Georgia railroad commission, the rate for 750 miles on hay would be 31 cents, as against 28 cents, charged by the defendants?

Mr. Jackson: Yes, sir.

Mr. Baxter: I wish you would look at the tariff of the South Carolina railroad commission—the standard tariff—and see what a reasonable rate for 750 miles would be on the scale adopted in that tariff?

Mr. Jackson: The South Carolina standard tariff for 350 miles is 31 cents per hundred pounds. I fail to work out the scale to 750 miles, but taking the ratio of increase as we start with the shorter line, and following that ratio in the same manner, the rates of the South Carolina commission I would say would go up to 35 or 36 cents a hundred pounds.

60 Mr. Baxter: For a distance of 350 miles the South Carolina commission allows 31 cents?

Mr. Jackson: Yes, sir.
Mr. Baxter: I wish to put that tariff in.
Mr. Jackson: It does not bear a number.
Mr. Baxter: Does it bear a date?
Mr. Jackson: It is in effect September 15, 1883.
Mr. Baxter: Has there been any subsequent tariff changing those rates?
Mr. Jackson: I am informed there has been no change.
Mr. Baxter: What is the population of Summerville as ascertained by you?
Mr. Jackson: Two thousand two hundred and nineteen.
Mr. Baxter: Is it situated on any water-course?
Mr. Jackson: No, sir.
Mr. Baxter: What railroads center there?
Mr. Jackson: The South Carolina.
Mr. Baxter: What is the distance from Charleston to Summerville?
Mr. Jackson: Twenty-one miles.
Mr. Baxter: What is the distance from Augusta to Summerville?
Mr. Jackson: One hundred and seventeen miles.
Mr. Baxter: Look at the standard tariff of the South Carolina railroad commission which you have just had before you and state what local rate is allowed by that commission on hay from Charleston to Summerville, a distance of 21 miles.
Mr. Jackson: Nine cents per hundred pounds.
Mr. Baxter: That is the rate charged in this case by these defendants?
Mr. Jackson: Yes, sir.
Mr. Baxter: What is the distance from Augusta to Charleston via the South Carolina railroad?
Mr. Jackson: One hundred and thirty-eight miles.
Mr. Baxter: What is the distance from Augusta to Charleston via the Port Royal and Augusta and the Charleston and Savannah railroads?
Mr. Jackson: One hundred and forty-eight miles.
Mr. Baxter: I wish you would state to the commission whether the Port Royal and Augusta and the Charleston and Savannah Railroad Companies compete with the South Carolina for business between Augusta and Charleston.
Mr. Jackson: Yes, sir.
Mr. Baxter: And whether the Port Royal and Augusta and the Charleston and Savannah will take business coming from Memphis at Augusta and carry it from Augusta at the same proportion of the Memphis and Charleston rate as the South Carolina?
Mr. Jackson: Yes, sir.
Mr. Baxter: There is a difference in distance of only 10 miles?
Mr. Jackson: Yes, sir.
61 Mr. Baxter: As I understand you, the defendant railroads west of Augusta could have delivered this hay in controversy to the Port Royal and Augusta and the Charleston and Savannah roads. They would have brought it to Charleston at the same pro-

portion of the Memphis and Charleston rate as the South Carolina charged, which would put it here at 19 cents, and then complainant would have to ship from Charleston to Summerville by the South Carolina railroad at the local rate of 9 cents; so he would have to pay 28 cents if it was shipped by the Port Royal and Augusta and Charleston and Savannah roads around by Charleston?

Mr. Jackson: Yes, sir, they would be very glad to take the business.

Mr. Baxter: That is all.

Cross-examination:

Mr. Northrop: I move to strike out the testimony of Mr. Jackson as to Baltimore and Chicago rates, on the ground that they are hearsay. Mr. Jackson, your road receives through traffic, class D from the East Tennessee, Virginia and Georgia railway from Memphis and carries it over your road and delivers to the South Carolina railway, does it not?

Mr. Jackson: Yes, sir.

Mr. Northrop: Do you know whether there is any actual competition in existence by water for freight originating at Memphis, by carrying it down the Mississippi river to New Orleans and then by water from New Orleans to Charleston?

Mr. Baxter: I wish to put in an objection, because I submit that the meaning of the term "actual competition" is a question of law that the witness cannot swear to. On briefs we expect to discuss that question, and I would like my friend to get at the facts.

Mr. Northrop: I supposed it was a matter of fact.

The Chairman: Ask if anything is carried that way.

Mr. Northrop: Are there any shippers taking grain or hay from Memphis to New Orleans and carrying it from New Orleans by water to Charleston; if so mention the lines and shippers.

Mr. Jackson: I do not know of any actual movement.

Mr. Northrop: I might put the same question. Do you know of any actual shippers or purchasers who convey freight of this class D through from Chicago over the lakes and canals and down by the sea to Charleston?

Mr. Jackson: Not of my own knowledge.

Mr. Northrop: You have not heard of any considerable movement of grain or hay to Charleston that way?

Mr. Jackson: Yes, sir.

Mr. Northrop: Large shipments?

Mr. Jackson: Yes, sir; I was informed by a heavy grain dealer in Charleston that over a year ago there were more than 1,100 cars of grain, flour and hay.

Mr. Northrop: Do you know of any such shipments in existence at present?

Mr. Jackson: No, I do not know of any just now.

62 Mr. Northrop: Then, there is no large movement or any movement of considerable extent of grain and hay from Chicago via the lakes and by sea to Charleston now?

Mr. Jackson: I do not know of any at the present time.

Mr. Northrop: You have made it a subject of inquiry?

Mr. Jackson: Yes, sir; I do not suppose there is any movement just now.

Mr. Northrop: So you do not think there is any actual competition by water from Chicago to Charleston?

Mr. Jackson: I do not understand that movement is necessary to produce competition. The existence of the rate produces it.

Mr. Northrop: There cannot be any competition unless the stuff is carried. All these four competing railroads are subject to the provisions of the act to regulate commerce, are they not? They carry the traffic between different States?

Mr. Jackson: Oh, yes, sir.

Mr. Northrop: All belong to the Southern Railway & Steamship Association?

Mr. Jackson: Yes, sir.

Mr. Northrop: There is no competition among those roads; all have the same rates?

Mr. Jackson: All those initial lines work the same rates between the same points.

Mr. Northrop: There is no cutting of rates between them?

Mr. Jackson: I do not know.

Mr. Northrop: Is not this grain and hay that comes from New York, for instance, raised in the West and then brought to New York for shipment by sea, most of it?

Mr. Jackson: You mean the hay and grain that comes into this territory?

Mr. Northrop: Yes, sir.

Mr. Jackson: Yes, sir; I will say that the grain was raised in the western grain places.

Mr. Northrop: Do you know of any existing steamship lines or other water carriers from Baltimore to Charleston, conveying this grain in large quantities or to any considerable extent?

Mr. Jackson: No, sir, I am not personally familiar with the lines in the grain business.

Mr. Northrop: You do not know of any?

Mr. Jackson: No, sir.

Mr. Northrop: You have made inquiry?

Mr. Jackson: Yes, sir, I have made inquiry.

Mr. Northrop: That is all.

Redirect examination:

Mr. Baxter: You say this hay that comes to Charleston, whether it comes via Ohio River points or via New York, is raised in the grain belt of the West.

Mr. Jackson: I understood the gentleman to ask in reference to grain.

Mr. Baxter: How in reference to hay?

63 Mr. Jackson: I do not know. I understand there is a good deal of hay brought to New York from eastern points. There is some eastern hay.

Mr. Baxter: Where is the hay grown that comes from Memphis?

Mr. Jackson: It is western hay, most of it. It is grown it Illinois, Missouri, and Missouri River territory.

Mr. Baxter: Is it not a fact that the competition in the carriage of that hay really starts on the farm where the hay is raised?

Mr. Jackson: Yes, sir.

Mr. Baxter: Some lines via Ohio river, and others via Chicago?

Mr. Jackson: Yes, sir.

Mr. Baxter: I will suggest to my brother on the other side, as he makes certain objections to my testimony as hearsay, that if he will be kind enough to give me a memorandum today some time, or write me after looking over the testimony, I will take the testimony, if I can procure it, that will be original so as to put the facts before the commission in legal form.

Mr. Northrop: All right, sir.

Com'r Knapp: The route over which it goes, that traffic passes through Summerville?

Mr. Jackson: It can, but not necessarily.

Com'r Knapp: The joint tariffs indicate movement of traffic by a certain route?

Mr. Jackson: The tariffs do not indicate a movement by any specific routes. There are certain rates effective between Memphis and Charleston, open to all lines.

Com'r Knapp: As a matter of fact, does the traffic coming from Memphis to Charleston pass through Summerville?

Mr. Jackson: Some does, and some does not.

Com'r Knapp: All hauled by this line?

Mr. Jackson: By the South Carolina?

Com'r Knapp: Yes, sir.

Mr. Jackson: It can reach Summerville without going over the South Carolina. We can give it to the Port Royal and Augusta and they can bring it to Charleston over the Charleston and Savannah.

The Chairman: Does your road make one of the roads that makes a line over which freight passes from Memphis to Charleston?

Mr. Jackson: It is one of the lines.

The Chairman: What are the other roads in the line of which yours is a part of the through line?

Mr. Jackson: We are a part, or can be made a part of the line on business originating with any of the initial lines.

The Chairman: You habitually carry through freight from Memphis to Charleston?

Mr. Jackson: Yes, sir.

The Chairman: Over several initial roads?

Mr. Jackson: Yes, sir.

The Chairman: Is the Memphis and Charleston one of them?

Mr. Jackson: Yes, sir.

64 The Chairman: Your road is the next then to the Memphis and Charleston?

Mr. Jackson: There is the Memphis and Charleston, the East Tennessee, Virginia and Georgia, and then the Georgia. Business

moves frequently out of Memphis over the Memphis and Charleston, and then over the Western and Atlantic.

The Chairman: I want the usual route when it passes over your line?

Mr. Jackson: The Memphis and Charleston, the East Tennessee, Virginia and Georgia, the Georgia and the South Carolina.

The Chairman: That passes through Summerville?

Mr. Jackson: Yes, sir.

The Chairman: And you habitually participate in the carriage of freight over that route?

Mr. Jackson: Yes, sir.

The Chairman: And when you do, you divide this 19-cent rate?

Mr. Jackson: A proportion of it; yes, sir.

The Chairman: And that part of the 19-cent rate to Charleston is less than your local rate of your road?

Mr. Jackson: Yes, sir.

The Chairman: And you carry that way on through bills, from Memphis to Charleston?

Mr. Jackson: Yes, sir.

The Chairman: Do you also carry to Summerville?

Mr. Jackson: Yes, sir.

The Chairman: The rate is made up in a different way?

Mr. Jackson: Yes, sir.

Commissioner Knapp: Is there considerable movement of hay and grain from Memphis to Charleston?

Mr. Jackson: Very considerable; yes, sir.

Commissioner Knapp: Can you give any idea of the amount during any given period of time?

Mr. Jackson: No, sir; no definite idea.

Commissioner Knapp: More or less of that traffic is moving all the time.

Mr. Jackson: Yes, sir.

Commissioner Knapp: Does some of it come by way of Birmingham or other points not through Chattanooga?

Mr. Jackson: Yes, sir.

Commissioner Knapp: On hay to Summerville do you get more as your proportion than on shipments to Charleston?

Mr. Jackson: No, sir; the lines west of Augusta do not participate in the local rate of 9 cents.

Commissioner Knapp: That is all.

The Chairman: Mr. Baxter, this is nearly the Social case over again?

Mr. Baxter: Yes, sir.

The Chairman: Now, what about Mr. Molony?

Mr. Northrop: He does not seem to be in his office. I think he must be around town somewhere collecting. I merely wanted to ask him if he knows of any of these shipments coming in
65 here by water, so that if the case comes up before another tribunal we will be safe.

The Chairman: We might just as well be informed about that

here—whether or not there is any such traffic coming in through here.

Mr. Northrop: Yes, sir. We want to prove that it is, or is not the fact. Mr. Molony would be a very likely man to know what is actually done in the shipment of grain, being engaged in that business.

The Chairman: Any man engaged in the business would be likely to know how these shipments were made here and if any are made by water, under what conditions, etc., and inform us as to the actual facts.

Mr. Baxter: Mr. Waring, who is connected with the South Carolina railway, is here, and it might save time to hear his testimony while waiting for the other gentlemen.

The Chairman: Yes, sir.

Mr. Baxter: Mr. Waring, please take the stand.

E. P. WARING, a witness on behalf of defendants, being duly sworn, testified as follows:

Mr. Baxter: May it please the commission, I have submitted some questions to Mr. Waring, and he has written out his answers. If the commission will permit that process of examination and allow Mr. Waring to read the questions and answers, it will save time, and the gentleman on the other side can cross examine him if he wishes.

(No objection.)

(Mr. Waring read questions and answers referred to; the same marked Exhibit 1.) As follows:

"Question No. 1. On classes 'C,' 'D' and 'F' from Memphis is the full South Carolina railway local rate added to the through rate, from Memphis to Augusta, on business to Summerville, S. C.?

"Answer. The full local rate of the South Carolina railway is added to the through rate, Memphis to Charleston, to make rate, Memphis to Summerville, S. C.

"Question No. 2. What is the through rate from Memphis to Augusta, Ga., on business to Summerville, S. C., or what is the through rate, Memphis to Augusta, and what is the full South Carolina railway local rate from Augusta to Summerville?

"Answer. C.–27c., D.–23c., F.–47c.—Through rate, Memphis to Augusta for points beyond. Augusta to Summerville—C.–18c., D.–15c., F.–36c.

"Question No. 3. What is the through rate Memphis to Charleston, and what is the South Carolina railway full local Charleston to Summerville on these classes?

"Answer. Through rate Memphis to Charleston, S. C., C. 23c.; D. 19c.; F. 18c. Locals Charleston to Summerville, S. C., C. 9c.; D. 9c.; F. 18c.

66 "Question No. 4. Is the nine cents charged from Charleston to Summerville, S. C., the authorized local of the commissioner?

"Answer. Yes.

"Question No. 5. I want the bill of lading on which this hay for Behlmer was handled, Memphis to Summerville, S. C.

"Answer. Bill of lading attached (to Exhibit 1).

"Question No. 6. Ascertain from the car record office if the car of hay in question did arrive at Summerville on August 17, 1892?

"Answer. M. P. car 7852 reached Summerville August 17th, 1892.

"Question No. 7. Did the roads west of Augusta get a larger portion of the through rate on the hay to Summerville than they would on hay to Charleston?

"Answer. Roads west of Augusta received the same on the through rate to Summerville as they received on the through rate to Charleston, S. C.

"Question No. 8. What would be the portion of each road, Memphis to Charleston?

"Answer. M. & C., 7.2 per 100 pounds; E. T., V. & G. R. R. or W. & A. R. R., 3.2 per 100 pounds; Ga. R. R., 3.9 per 100 pounds. Transfer, 1.5 per 100 pounds; S. C. R'y, 3.2 per 100 pounds.

"Question No. 9. What would be the rate, Memphis to Summerville, via the route that this hay was handled?

"Answer. 28 cents per 100 pounds.

"Question No. 10. What is the rate on grain and hay from Chicago via the Erie canal and New York to Charleston?

"Answer. Have no knowledge.

"Question No. 11. What is the rate on this class of freight from Boston to Charleston?

"Answer. 20 cents per 100 pounds.

"Question No. 12. From New York to Charleston?

"Answer. 14 cents per 100 pounds.

"Question No. 13. From Philadelphia to Charleston?

"Answer. 14 cents per 100 pounds.

"Question No. 14. From Baltimore to Charleston?

"Answer. No steamer line from Baltimore to Charleston. Rail and water rate via Virginia ports 17 cents per 100 pounds.

"Question No. 15. What was the rate per ton per mile on the carload in question; in other words, how many tons of hay was in the car, and what was the gross freight, and what was the amount per ton per mile earned by each road handling the hay?

"Answer. Ten tons. Gross freight, $56.00; divided M. & C. $14.40, E. T., V. & G. R. R. $6.40, Ga. R. R. $7.80, transfer $3.00, S. C. $24.40. The lines hauling earned per ton per mile as follows:

"M. & C. R. R. 4.6 tenths mills per ton per mile; E. T., V. & G. R. R. 4.6 tenths mills per ton per mile; Ga. R. R. 4.6 tenths mills per ton per mile. Transfer, arbitrary; S. C. R'y 2.1 tenths cents per ton per mile.

"Question 16. How much less is the rate or portion of rate on hay, Memphis to Charleston to Summerville, that the South
67 Carolina railway received than the authorized local rate on hay from Augusta to Summerville?

"Answer. Local rate, Augusta to Summerville, class 'D,' 15 cents

per 100 pounds. S. C. R'y received 12.2 tenths cents per 100 pounds, or 2.8 tenths cents per 100 pounds less the local."

Mr. Baxter: You stated that the rate on this class of freight from New York and Philadelphia to Charleston is 14 cents per 100 pounds. Please look at this tariff of the Clyde Steamship Company, which I offer in evidence, and state whether or not those rates are not obtained from that tariff?

Mr. Waring: Yes, sir; I presume they are.

Mr. Baxter: I will ask you if schooner rates cannot be obtained from those points to Charleston much below Clyde rates?

Mr. Waring: I certainly think they can.

Mr. Baxter: I will ask you if those are not the rates from New York proper, and if the Clyde Steamship Company will not give much lower rates to Charleston from New York on business that originates in Chicago and the West?

Mr. Waring: I think they would, sir.

Mr. Baxter: A year ago were not large quantities of this freight brought here from eastern ports so as to substantially supply the Charleston market—by vessel?

Mr. Waring: I think there was, but I am unprepared to say as to the extent. There was quite an amount, not only a year ago, but some time previous to that. Sometimes cargoes of corn have been brought in here not only from eastern ports, but from Virginia ports.

Mr. Baxter: Hay takes the same rate as corn, does it not?

Mr. Waring: Yes, sir.

Mr. Baxter: The effect of that traffic being brought in here by vessel—what effect would that have upon traffic from Ohio and Mississippi River points?

Mr. Waring: It would relieve the rail lines of the haul to this port.

Mr. Baxter: That is all.

Cross-examination:

Mr. Northrop: From what eastern and Atlantic ports does this corn come?

Mr. Waring: New York, Baltimore, and perhaps Philadelphia.

Mr. Northrop: How can it get to Baltimore, New York, and Philadelphia from the West?

Mr. Waring: I suppose over the canal and lake routes.

Mr. Northrop: Does it come by rail?

Mr. Waring: Yes, sir; in some measure—conjoined line of rail and water—lake and rail.

Mr. Northrop: If it comes by water where does it originate?

Mr. Waring: I don't know that I could say exactly. I suppose in Illinois and Missouri and that vicinity.

Mr. Northrop: What other points could it originate at where it could come by water?

68 Mr. Waring: Almost any lake point and a great many river points.

Mr. Northrop: Is it not a fact that most of the grain that comes by lakes starts from Chicago?

Mr. Waring: I don't think I could answer that question correctly.

Mr. Northrop: If it comes from Mississippi River points on east side does it not come by rail to the seaboard?

Mr. Waring: Some proportion does.

Mr. Northrop: Are the rates from the east side of the Mississippi to the seaboard over the northern roads as great, or are they not greater than the rates from Memphis to the seaboard—to Charleston?

Mr. Waring: I cannot say positively; perhaps to certain points.

Mr. Northrop: Are not the distances greater?

Mr. Waring: Yes, sir.

Mr. Northrop: What is the distance between Chicago and New York?

Mr. Waring: I have not the figures; I don't know, sir.

Mr. Northrop: You don't know the distance from the Mississippi river, or from any Mississippi River points, to the seaboard?

Mr. Waring: I have not the figures with me.

Mr. Northrop: Is there any actual grain coming in here now by way of water from Chicago in large quantities?

Mr. Waring: I don't think so.

Mr. Northrop: Why does it not come?

Mr. Waring: I suppose for one reason, that there is not a large amount of grain coming from any point at present.

Mr. Northrop: Does it come?

Mr. Waring: It may not come because the rate is not in favor of that route now. Judging from the evidence of Mr. Jackson this morning I would say that the rates are in favor of that route.

Mr. Northrop: Does it come? Would you not know?

Mr. Waring: I am not supposed to know what the traffic by the Clyde Steamship Company is.

Mr. Northrop: You do not know whether there is any handled by water to Charleston?

Mr. Waring: I could not answer that positively. There is from time to time an amount of baled hay and grain via Clyde steamship line from New York to Charleston, but as to the origin of that grain I don't know.

Mr. Northrop: Is that very large?

Mr. Waring: No, sir; very small.

Mr. Northrop: Don't you receive and deliver through traffic originating at Memphis, Tennessee, from the Georgia road, and deliver over your line to various points on through bills of lading?

Mr. Waring: Yes, sir.

Mr. Northrop: Don't you receive stuff originating at Memphis on through bills of lading for Summerville?

Mr. Waring: Yes, sir.

Mr. Northrop: That is all.

69 Mr. Northrop: Have you any objection to Mr. Kracke taking the stand, Mr. Baxter?

Mr. Baxter: No, sir.

F. D. C. KRACKE, JR., a witness on behalf of complainants, being duly sworn, testified as follows:

Direct examination:

Mr. Northrop: Mr. Kracke, will you state to the commission whether the majority of the grain gets to Charleston by rail or water?

Mr. Kracke: It differs at times. It depends upon the prices of grain at Chicago and other points; it is sometimes higher at Chicago, and sometimes lower. It is too high for us now.

Mr. Northrop: How does it reach here now, all rail?

Mr. Kracke: All rail, yes, sir.

Mr. Northrop: You deal in grain to a very large extent, do you not, Mr. Kracke?

Mr. Kracke: I handle a fair quantity, yes, sir.

Mr. Northrop: How many car-loads a year do you handle?

Mr. Kracke: I cannot say exactly.

Mr. Northrop: About how many?

Mr. Kracke: I really don't know. In fact, I do not want to give the particulars of my business away. I think that is going too far.

Mr. Northrop: You are a large dealer?

Mr. Kracke: Yes, sir, in proportion to the amount of grain sold here.

Mr. Northrop: Coming from Chicago does it come by water?

Mr. Kracke: Sometimes it comes by rail; mostly by water and rail.

Mr. Northrop: What do you mean by water and rail?

Mr. Kracke: By lake and rail; part water and part rail.

Mr. Northrop: Is there any amount of that now?

Mr. Kracke: No, the rates are too high.

Mr. Northrop: When it comes from Memphis can it get here by water at all?

Mr. Kracke: No, sir, but I suppose it is possible.

Mr. Northrop: Does it?

Mr. Kracke: No, sir.

Mr. Northrop: Did you ever hear of any coming by the Mississippi river, Mr. Kracke?

Mr. Kracke: No, sir.

Mr. Northrop: How long have you been in business?

Mr. Krake: 30 years.

Mr. Northrop: Did you ever have any shipment that way?

Mr. Kracke: No, sir.

Mr. Northrop: So any grain originating at Memphis comes here all rail?

Mr. Kracke: Yes, sir.

Mr. Northrop: That market is better than Chicago for prices?

70 You can buy cheaper in Memphis and sell here than in Chicago—than by getting it from Chicago by water?

Mr. Kracke: Yes, sir.

Mr. Northrop: Mr. Kracke, do you know how far Memphis is from Chicago?

Mr. Kracke: No, sir.
Mr. Northrop: That is all.

Cross-examination:

Mr. Baxter: What is the price of hay in Chicago?
Mr. Kracke: I really don't know; I have not sold a bale of hay in that country for a long time.
Mr. Baxter: You don't keep up with the daily quotations?
Mr. Kracke: Yes, sir, I get them from different points.
Mr. Baxter: In what section of the country is the hay raised that comes here from Memphis?
Mr. Kracke: All through Missouri, sir, Kansas and that vicinity.
Mr. Baxter: Mr. Kracke, take the section of country where that hay is raised; what is the railroad distance from that point to Chicago? How much farther would the farmer have to send his hay, from the section where this hay is raised, by Chicago than by Memphis?
Mr. Kracke: I do not know, sir.
Mr. Baxter: Don't you know of shipments of grain from Chicago via the lakes and canals to New York, and thence by steamer or vessel to Charleston?
Mr. Kracke: I have heard them, sir; I think about four years ago. The prices in Chicago do not justify that now. They are too high in Chicago now.
Mr. Baxter: What were the rates obtained by that route when you were shipping that way? Can you state from recollection what those rates were?
Mr. Kracke: I do not recollect; it is too long ago.
Mr. Baxter: Don't your hay cost about the same to deliver it here now?
Mr. Kracke: I think about the same; perhaps a little less.
Mr. Baxter: Mr. Kracke, do you know the rate from Memphis to New Orleans on class D?
Mr. Kracke: No, sir.
Mr. Baxter: Do you know whether or not a lower rate can be obtained by Mississippi river to New Orleans and by chartered steamer from New Orleans?
Mr. Kracke: I don't think it can be done, sir.
Mr. Northrop: Does much hay come from Maine and New York?
Mr. Kracke: Yes, sir, sometimes.
Mr. Baxter: I am requested to ask you if last winter there were not some cargoes of grain brought in here from Virginia ports?
Mr. Kracke: I think last summer one or two cargoes were brought here.
71 Mr. Baxter: From what points?
Mr. Kracke: I think from Norfolk.
Mr. Baxter: Did that originate there, or where was it grown?
Mr. Kracke: Up in that vicinity, I suppose.
The Chairman: Where did you say?
Mr. Kracke: Norfolk, Virginia.
Mr. Baxter: Was that not brought here at a cost here that ena-

bled those gentlemen who brought it here to undersell those bringing it from the West?

Mr. Kracke: Yes, sir,

Mr. Baxter: Now, suppose these defendant roads in this case operating from Ohio River points to Charleston, should raise the rates from those points to Charleston materially above what they are now, on class D, would it not have the effect of bringing large quantities by that route?

Mr. Kracke: Yes, sir; I think it would perhaps.

Mr. Baxter: Have you ever shipped any by that route—around by New York?

Mr. Kracke: Yes, sir, I have had some by New York from Chicago.

Mr. Baxter: That is all I wish to ask.

Redirect examination:

Mr. Northrop: Does very much of this Virginia grain come to this market, Mr. Kracke?

Mr. Kracke: Not very much; sometimes large volumes come from the West.

Mr. Northrop: Maine and Virginia do not play a very large part, do they?

Mr. Kracke: No, sir.

Mr. Northrop: That is all.

The Chairman: We have not heard from Mr. Molony yet.

Mr. Northrop: No, sir; he must be around town on business somewhere.

The Chairman: Are there other witnesses?

Mr. Baxter: Yes, sir; Mr. Ward.

C. M. WARD, a witness on behalf of defendants, being duly sworn, testified as follows:

Mr. Baxter: Which one of these defendant companies are you connected with, Mr. Ward?

Mr. Ward: I am general manager of the South Carolina railway.

Mr. Baxter: State to the commission what would be the effect on revenue to your road if you were compelled to reduce all of your local rates to the proportion that your company receives on through rates?

Mr. Ward: It would very nearly ruin the South Carolina railway. If the rates were brought down to meet the Charleston rate, which we are obliged to apply and use here—if they were brought down to meet the Charleston rate, which is made to meet the
72 water rates—it would reduce every local rate on our road to that proportion to come within the long and short haul clause, and it would tremendously reduce the revenue of the South Carolina railway. They are hardly making enough to run them now, and if that new system of rates went into effect it would practically ruin us.

Mr. Baxter: Do you know what you reported to the Interstate Commerce Commission as the cost per ton per mile for moving freight?

Mr. Ward: Yes, sir; I have it here. It is 1.46 cents per ton per mile. Did you ask me the cost, or earnings?

Mr. Baxter: The cost.

Mr. Ward: The cost is 7.38 mills per ton per mile on all classes of freight. I have a copy here of our report to the Interstate Commerce Commission for the year ending June 30th, 1892. That shows the average cost of hauling all kinds of freight per ton per mile.

Mr. Baxter: That is all classes of freight?

Mr. Ward: Yes, sir. The cost of hauling all kinds.

Mr. Baxter: What is the average capacity of your freight trains; how many cars can an engine pull from Augusta here?

Mr. Ward: We can haul about 35 cars—33 to 35.

Mr. Baxter: Now, suppose you had a train of 33 cars at Augusta destined for Charleston, and you were offered these two cars of hay to be brought on that train, could you not draw those two cars with the other 33, and could you not afford to take them at a less rate per ton per mile than you could all your traffic?

Mr. Ward: How is that?

Mr. Baxter: You say your engines can pull 35 cars from Augusta here. You have reported to the Interstate Commerce Commission that the average cost of all freight is a certain sum per ton per mile. Suppose instead of having a full loaded train of 35 cars you only had 33, but you wanted two more to fill out your train, could you not afford to take those two cars for a less rate per ton per mile than the average rate?

Mr. Ward: Yes, sir.

Mr. Baxter: Then the cost of moving those additional cars would be very much less than the average cost of cars?

Mr. Ward: Yes, sir.

Mr. Baxter: How much do you get out of this traffic in controversy? I think you reported here that you got your per cent. of 3.2 cents per 100 pounds?

Mr. Ward: Yes, sir.

Mr. Baxter: Your average cost is 7.38 mills?

Mr. Ward: Yes, sir.

Mr. Baxter: Your proportion of the through rate is what?

Mr. Ward: I don't recollect that.

Mr. Baxter: Are you prepared to figure out how many mills per ton per mile your proportion of through rate is, Memphis to Charleston?

Mr. Ward: It would be 4.6 mills per ton per mile; 138 miles.

73 Commissioner Knapp: Then the rate you are charging on that is not less than it costs you to haul it on that through rate?

Mr. Ward: No, sir.

The Chairman: You don't carry through at 6th class; that 19-cents rate is not sixth-class rate, Memphis to Charleston?

Mr. Ward: It is class D.

Mr. Baxter: It is the official sixth class, but the Southern Railway and Steamship Association, class D.

The Chairman: That class, grain and hay, is a very low grade freight and carried at comparatively cheap rates?

Mr. Ward: Yes, sir, it has to be.

The Chairman: You reported that the average cost per ton per mile on all your business is 7.38 mills?

Mr. Ward: Yes, sir.

The Chairman: Then on grain and hay it would be very much less than that, would it not?

Mr. Ward: You mean the cost of haul?

The Chairman: Yes, sir.

Mr. Ward: I would like to make a statement, Mr. Commissioner, that that report we make to you in accordance with the forms is very erroneous and leads to wrong conclusions entirely. It is made up on a wrong basis; for instance, it is made up on a basis of train mileage. The mileage of passenger trains is greater than that of freight trains. It is ridiculous to come down to look at it from a business standpoint. It shows that our passenger business is away over in debt and that we are making an immense profit out of our freight business, when we are barely making a living out of it.

Commissioner Knapp: Mr. Ward, that arises from the fact that you are making more money out of freight than passenger business, does it not?

Mr. Ward: No, sir. Our freight is so light in summer time that passenger-train mileage is in excess of freight. These reports are made up on that basis.

The Chairman: Make it on your own basis or on any basis known to those who manage transportation of hay and grain and this class D of articles of freight. Is it not moved and handled and transported at very much less per ton per mile than the general average of freight?

Mr. Ward: Our general average of freight is that class of business. Three-fourths of our business is made up of that class of freight. It would cost very much less than strawberries or any class of vegetables, because we don't load that hay at all; we don't load or unload it.

The Chairman: Take the general average.

Mr. Ward: Well, three-fourths of our business is that kind of freight. I think that that would be the average freight. I can tell you what an immense tonnage of hay we haul. We haul 9,600,000 pounds of hay. So you see it is quite an item in our business.

The Chairman: What do you carry in considerable quantities that is less than that—that costs less to handle?

74 Mr. Ward: Well, I don't know. We handle a great deal of rock going out here on the jetties. I think that costs a little more to handle. Fertilizers go at lower rates. You can get a better rate on that than on hay, there are a few more tons in a car; I think the expense would be about the same though. There are more tons in a car, and consequently more revenue. Hay or

any of that western produce is about what our average freight is, and the expense and profits on that would be about the average expense and average profit.

The Chairman: If that is your opinion, we will take it as such.

Commissioner Knapp: A large proportion of your business is bringing this hay and grain from the West?

Mr. Ward: Nearly all of our east-bound business is that.

Commissioner Knapp: Can you give us some idea of the manner in which that traffic is divided as between Charleston and other points which get the 19-cent rate and the interior points which have a higher rate?

Mr. Ward: Our business to Charleston proper is considerably larger than our business to local stations.

Commissioner Knapp: Do you mean that it is larger than the aggregate?

Mr. Ward: Yes, sir, than all of our local stations.

Mr. Northrop: Mr. Ward, does this stuff go back over your road to be distributed in the interior?

Mr. Ward: A very small proportion.

Mr. Northrop: Where does that stuff go that you bring here?

Mr. Ward: It stays right here; consumed right here, Charleston and neighborhood. If there was a dealer who wanted to send a car-load to Orangeburg, he would send it to Orangeburg direct. A station of any size on our road would be direct. It would not come to Charleston.

Mr. Northrop: Can you give us the rate per ton per mile, that is, the cost per ton per mile on this traffic; can you take that out?

Mr. Ward: No, sir, I cannot do that.

Mr. Northrop: Can you give us the profit on this particular stuff?

Mr. Ward: No, sir. The gross earnings on all freight is about 7 mills.

Mr. Northrop: That is all; no further questions.

H. A. Molony, a witness on behalf of the defendant-, having been duly sworn, testified as follows:

Mr. Baxter: What is your business?

Mr. Molony: I am in the hay and grain business.

Mr. Baxter: Here in Charleston?

Mr. Molony: Yes, sir.

Mr. Baxter: I will ask you, Mr. Molony, if you have ever brought any hay from Chicago via the lakes, canal and ocean, and, if so, what rate you paid?

Mr. Molony: I have had hay brought rail and lake from Chicago.

75 Mr. Baxter: At what rates?

Mr. Molony: I cannot give the rates on hay, but I can on grain. I think there is a differential on hay of 2 or 3 cents. I am not positive, but I think there is.

Mr. Baxter: What is the rate on grain?

Mr. Molony: Twenty-three cents.

Mr. Baxter: That includes all the way from Chicago?
Mr. Molony: Yes, sir.
Mr. Baxter: A differential of 3 cents would make 26 cents on hay?
Mr. Molony: Yes, sir.
Mr. Baxter: How long has it been since you bought any?
Mr. Molony: About 16 months.
Mr. Baxter: What rate can you obtain on hay from Norfolk and Baltimore to Charleston?
Mr. Molony: I can get a rate from New York—I do not get much hay from Baltimore—I can get a rate from New York of $1.60 per ton, 8 cents per hundred.
Mr. Baxter: Have you ever known what the charter rates would be—what it would cost to charter a vessel from New Orleans to Charleston to bring any kind of freight, hay or anything else around that way?
Mr. Molony: I never figured it myself, but I have heard from other people who wanted to bring oats from Galveston and New Orleans that they could make a rate of from four to six cents a bushel.
Mr. Baxter: How much is that per 100 pounds?
Mr. Molony: About 18 or 20 cents.
Mr. Baxter: Do you know the rate on steamed oats from Memphis to New Orleans?
Mr. Molony: No, sir; I do not. I never figured that.
Mr. Baxter: Do they not sometimes bring sugar and molasses that way?
Mr. Molony: Yes, sir.
Mr. Baxter: Do you know what they charge per ton for that service?
Mr. Molony: No, sir, I could not tell exactly.
Mr. Baxter: The rates on sugar and molasses and hay and grain bear a relation on the tariffs?
Mr. Molony: Yes, sir.
Mr. Baxter: If we could get the rates on sugar and molasses, we could figure them on hay and grain?
Mr. Molony: I think so.

Cross-examination:

Mr. Northrop: Does any hay or grain come from Memphis to Charleston by water?
Mr. Molony: Not that I know of.
Mr. Northrop: You never heard of any?
Mr. Molony: None.
76 Mr. Northrop: There is no existing line of ships carrying grain and hay from Memphis to Charleston via New Orleans now?
Mr. Molony: No, sir.
Mr. Northrop: How long have you been in business?
Mr. Molony: Seven years.

Mr. Northrop: You never heard of hay or grain coming to Charleston that way?

Mr. Molony: No, sir.

Com'r Clements: The shipment of corn a year and a half ago on which you paid 23 cents, what route did that come over?

Mr. Molony: Rail and lake to Buffalo, canal from there, and steamer down from New York.

Com'r Clements: You paid the freight here?

Mr. Molony: Yes, sir.

Com'r Clements: What line brought it—the Clyde steamship line?

Mr. Molony: I think so; yes, sir.

The Chairman: How many persons beside yourself are in the same business in Charleston that do considerable business in your line?

Mr. Molony: There are five.

The Chairman: Where do you habitually get your grain and hay?

Mr. Molony: Principally West. We have bought considerable grain East in this last two years on this difference of rate, and then prices West have been a little out of line in comparison with the prices when we buy East and bring it down by water.

The Chairman: Does it habitually occur that you buy East?

Mr. Molony: We generally buy West.

The Chairman: You bought once in the last year and a half East?

Mr. Molony: I bought more than once. The corn I bought a year and a half ago—I think it was in the latter part of August. I bought it in Chicago. It came by rail, lake and steamer.

The Chairman: Was that a tariff rate?

Mr. Molony: It was a current rate at that time to all shippers from Chicago.

Com'r Knapp: Suppose you had to pay 25 cents, hay and grain from Memphis, would it stop coming that way?

Mr. Molony: Yes, sir.

Com'r Knapp: You would get it by New York or some Atlantic port?

Mr. Molony: Yes, sir.

Com'r Knapp: At a 19-cent rate you get most by all rail from the West?

Mr. Molony: We can figure it this way on a 19-cent rate: Hay in Memphis would be about $12.75. I can buy the same grade of hay in New York for $15. At a rate of $1.60 it would make it pretty much the same cost. If they raise the rate of 19 cents from Memphis, we would naturally buy all the hay East.

77 The Chairman: So that if the prices raised one way and did not the other, you would change your mode of business?

Mr. Molony: Certainly; we would have to do it.

The Chairman: You would go where you found the best market?

Mr. Molony: We would try to.

The Chairman: And it would depend on the price of hay to begin with—the production as well as the rates?

Mr. Molony: Yes, sir.

The Chairman: Have you noticed from time to time—I suppose you give sufficient attention to the subject to enable you to answer as to the relative prices of hay between the two markets, Memphis and New York—how do they compare ordinarily?

Mr. Molony: Ordinarily the West is cheaper than they are in New York.

The Chairman: Take the two points—Memphis and New York?

Mr. Molony: It is cheaper in Memphis than in New York.

The Chairman: About what is the usual difference?

Mr. Molony: It will vary from two to five dollars a ton.

The Chairman: An average of about $3.50?

Mr. Molony: Yes, sir.

The Chairman: Then, whenever you can make more than $3.50 difference in the freight from New York, you would go that way?

Mr. Molony: I think I would.

The Chairman: For the present and recently, your market here has been west?

Mr. Molony: Yes, sir.

The Chairman: Do you remember how long this 19-cent rate from Memphis has been in force?

Mr. Molony: About 3 years.

The Chairman: And in that time the bulk of the trade has been from the West?

Mr. Molony: Yes, sir.

A. G. JACKSON recalled:

Mr. Baxter: Mr. Jackson, I wish you would explain to the commission when this rate was made 19 cents, and whether it was higher or lower before?

Mr. Jackson: The rate of 19 cents from Memphis to Charleston was reduced from 23 cents to 19 cents in August, 1891. That is my recollection. That reduction was made necessary on account of the movement by the rail and water lines. We were carrying a 4-cent higher rate from Memphis and Ohio and Mississippi River points than we are now carrying. It was necessary to reduce them to meet this water and rail competition,

Mr. Baxter: If you were to restore the rate to 23 cents, what would be the consequence?

Mr. Jackson: It would go back to the water lines.

Mr. Baxter: I will ask you—I concede Mr. Jackson has no such knowledge of the fact as would make his testimony competent, but we took the testimony of Mr. Marsh, who was in the auditor's office, to show the cost per ton per mile of car-load freight carried through between Atlanta and Augusta. Mr. Jackson did not make the compilation and does not know that it is correct. If there is no objection we will have proof by Mr. Marsh.

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Mr. Northrop: If it is subject to correction I have no objection.

Mr. Baxter: Mr. Jackson, what does he show the cost per ton per mile, on car-load freight through Atlanta to Augusta, such as these car-loads were?

Mr. Jackson: This statement made by Mr. Marsh, showing earnings of train No. 6, March 21, 22 and 23, actual earnings of the train, shows that the cost per ton per mile on car-load freights is 4.2 mills per ton per mile; the cost of hauling miscellaneous freight is 8.89 mills in less than car-loads. Miscellaneous means less than car-loads in that sense.

The Chairman: That is over your line alone?

Mr. Jackson: Yes, sir.

The Chairman: And the expense would be about the same in transporting the freight received from another road?

Mr. Jackson: As if originating at one of our terminals?

The Chairman: Yes, sir.

Mr. Jackson: Well, yes, sir; there would be very little, if any, difference in cost.

The Chairman: This Memphis freight that is in dispute would cost about the same?

Mr. Jackson: Yes, sir; as I understand your question. You want to know whether it would cost any more or less for Memphis freight than to receive the same freight at Atlanta, Ga. There would be some increase in cost of transporting if it was received in our depots and loaded into cars at Atlanta. Memphis freight would be carried a little cheaper.

Cross-examination:

Mr. Northrop: Suppose that the grain that comes from the Mississippi and comes from Memphis were taken by way of Chicago, would it not be more expensive to take it to Chicago and bring it down here by the lakes, rail and steamer, than to transport it by rail 750 miles to Charleston—suppose the stuff, wherever it comes from, is deposited in Memphis, and it starts from Memphis up to Chicago, and then comes down by the water routes?

Mr. Jackson: It would never go to Memphis if it was going to Chicago.

Mr. Northrop: Suppose it originated at Memphis, would it not be more expensive to take it by way of Chicago than to come directly across by rail?

Mr. Jackson: Yes, sir; the distance is much greater.

Mr. Northrop: There is no competition between that grain that meets the Memphis line at Chicago to Charleston?

Mr. Jackson: Unless you consider the relations which the rates from Memphis bear to the rates from Chicago to Charleston; it would be more expensive to take that grain from Memphis to Chicago than to carry all rail from Memphis to Charleston.

79 Mr. Northrop: That is all.

The Chairman: Is there anything further, gentlemen?

Mr. Brawley: If the commission please, I am here to speak for Mr. Barnwell, my partner, who had charge of this case. I had no

knowledge of it. He was called to Washington by a case before the Supreme Court. I know nothing of the preparation of this case. Whether Mr. Barnwell will desire to put in any testimony, I do not know. I should like the privilege of consulting him if he has any testimony to put in.

Mr. Northrop: I do not think he wants to put in any testimony. If he does, we will have no objection, but we would not like a delay of the decision.

The Chairman: Assuming that he has no further testimony to put in, what will we do with the case?

Mr. Northrop: We are ready to submit it.

The Chairman: Will you give us what information you can in briefs after some reasonable time?

Mr. Baxter: What time will the commission allow to file briefs?

The Chairman: You can arrange it between yourselves.

Mr. Baxter: I would like to have a copy of the stenographer's notes, and I would like to be able to formulate a set of facts and have the pages of the testimony on which I rely.

The Chairman: How much time do you want, Mr. Northrop?

Mr. Northrop: Not very long. We are ready with our proposed findings now. This week would do me.

The Chairman: How long do you want, Mr. Baxter?

Mr. Baxter: So many days after I get from the stenographer a copy of the testimony, as I will rely on it to prove the facts. That, I suppose, would be most acceptable to the commission, that the counsel would first brief the propositions of fact that they want to be found, and then let the commission decide ten days after I get the copy from the stenographer.

The Chairman: We cannot tell when he will be ready with them. We will not be back to Washington for ten days.

Mr. Baxter: Can we not have ten days from the time we receive copies of the testimony?

The Chairman: We are not now furnishing copies.

Mr. Baxter: I did not know that. We relied on getting it from the stenographer.

The Chairman: We will give it to you this time.

Mr. Baxter: Well, I will take notice of that hereafter.

The Chairman: Well, Mr. Northrop; you will have ten days after you get a copy of the testimony and Mr. Baxter, you will have ten days additional.

There being no further business before the commission, at 1.10 p. m. the commission adjourned.

Question No. 1. On classes "C," "D" and "F" from Memphis, is the full South Carolina railway local rate added to the through rate, from Memphis to Augusta on business to Summerville, S. C.?

80 Answer. The full local rate of the South Carolina railway is added to the through rate, Memphis to Charleston, to make rate, Memphis to Summerville, S. C.

Question No. 2. What is the through rate from Memphis to Augusta, Ga., on business to Summerville, S. C., or what is the through

rate, Memphis to Augusta, and what is the full South Carolina railway local rate from Augusta to Summerville?

Answer. C.–27c., D.–23c., F.–47c.—Through rate, Memphis to Augusta for points beyond. Augusta to Summerville—C.–18c., D.–15c., F.–36c.

Question No. 3. What is the through rate Memphis to Charleston, and what is the South Carolina railway full local Charleston to Summerville on these classes?

Answer. Through rate Memphis to Charleston, S. C., C. 23c.; D. 19c.; F. 18c. Locals Charleston to Summerville, S. C., C. 9c.; D. 9c.; F. 18c.

Question No. 4. Is the nine cents charged from Charleston to Summerville, S. C., the authorized local of the commissioner?

Answer. Yes.

Question No. 5. I want the bill of lading on which this hay for Behlmer was handled, Memphis to Summerville, S. C.

Answer. Bill of lading attached.

Question No. 6. Ascertain from the car record office if the car of hay in question did arrive at Summerville on August 17, 1892?

Answer. M. P. car 7852 reached Summerville August 17th, 1892.

Question No. 7. Did the roads west of Augusta get a larger portion of the through rate on the hay to Summerville than they would on hay to Charleston?

Answer. Roads west of Augusta received the same on the through rate to Summerville as they received on the through rate to Charleston, S. C.

Question No. 8. What would be the portion of each road, Memphis to Charleston?

Answer. M. & C., 7.2 per 100 pounds; E. T., V. & G. R. R. or W. & A. R. R., 3.2 per 100 pounds; Ga. R. R., 3.9 per 100 pounds. Transfer, 1.5 per 100 pounds; S. C. R'y, 3.2 per 100 pounds.

Question No. 9. What would be the rate, Memphis to Summerville, via the route that this hay was handled?

Answer. 28 cents per 100 pounds.

Question No. 10. What is the rate on grain and hay from Chicago via the Erie canal and New York to Charleston?

Answer. Have no knowledge.

Question No. 11. What is the rate on this class of freight from Boston to Charleston?

Answer. 20 cents per 100 pounds.

Question No. 12. From New York to Charleston?

Answer. 14 cents per 100 pounds.

Question No. 13. From Philadelphia to Charleston?

Answer. 14 cents per 100 pounds.

81 Question No. 14. From Baltimore to Charleston?

Answer. No steamer line from Baltimore to Charleston. Rail and water via Virginia ports 17 cents per 100 pounds.

Question No. 15. What was the rate per ton per mile on the carload in question; in other words, how many tons of hay was in the

car, and what was the gross freight, and what was the amount per ton per mile earned by each road handling the hay?

Answer. Ten tons. Gross freight, $56.00; divided M. & C. $14.40, E. T., V. & G. R. R. $6.40, Ga. R. R. $7.80, transfer $3.00, S. C. $24.40. The lines hauling earned per ton per mile as follows: M. & C. R. R. 4.6 tenths mills per ton per mile; E. T., V. & G. R. R. 4.6 tenths mills per ton per mile; Ga. R. R. 4.6 tenths mills per ton per mile. Transfer, arbitrary; S. C. R'y 2.1 tenths cents per ton per mile.

Question 16. How much less is the rate or portion of rate on hay, Memphis to Summerville, that the South Carolina railway received than the authorized local rate on hay from Augusta to Summerville?

Answer. Local rate, Augusta to Summerville, class "D," 15 cents per 100 pounds. S. C. R'y received 12.2 tenths cents per 100 pounds, or 2.8 tenths cents per 100 pounds less the local.

Memphis and Charleston Railroad Company and connections.

Through Bill of Lading.

The right to compress cotton reserved in this bill of lading.
This receipt to be presented without alteration or erasure.

MEMPHIS, TENN., *Aug.* 12, 1892.

Received by the Memphis and Charleston R. R. Co., of Moulton Davis Co., under the contract hereinafter contained, the property mentioned below, marked and numbered as per margin, in apparent good order and condition, contents and value unknown.

Consigned to: Notify F. D. C. Kracke's Sons, Summerville, S. C.

(Original.)

Marks and numbers.	No. packages.	Description of articles.	Weight.
M. P. 7852	2,144	Bales T. hay..... 5,600	20,000

Ga. R. R.

B. HUGHES *Agent.*

82 EXHIBIT 2.

Clyde Steamship Company—New York, Charleston, and Florida lines.

NEW YORK, *August* 1, 1889.

The following are rates to Charleston, based on the classifications of the Southern Railway and Steamship Association, with the exceptions noted below:

	Rates in cents per 100 pounds.												
	Classes.												Per barrel.
	1.	2.	3.	4.	5.	6.	A.	B.	C.	D.	E.	H.	F.
From New York and Philadelphia.....	50	40	34	28	23	17	13	16	16	14	18	25	25
From Boston..... Fall River.... Providence...	55	45	38	30	25	22	20	22	22	20	27	25	38

Exceptions to Southern Railway and Steamship Association classifications referred to above.....

WM. P. CLYDE & CO.,
General Agents, 12 South Wharves, Philadelphia; 5 Bowling Green, New York.

THEO. G. EGER,
Traffic Manager, 6 Bowling Green, New York.

Deposition of Theo. Nathan.

Interstate Commerce Commission.

H. W. BEHLMER
vs.
MEMPHIS AND CHARLESTON RAILROAD COMPANY ET AL.

Deposition of Theo. Nathan, taken pursuant to stipulation hereto annexed, before John X. Smith, at office, No. 18 Broad street, Charleston, South Carolina, on the fifteenth (15th) day of May, eighteen hundred and ninety-three.

Witnesses for defendant: Theo. Nathan and W. H. Jones.

Appearance-: Jos. W. Barnwell for defendant-, D. H. Chamberlain, receiver; C. B. Northrop for petitioner.

It is hereby agreed between us that the following testimony shall be taken by John X. Smith, and written out by him and submitted to the commission, the signatures of the witnesses and commissioner and notice of the deposition as required by rule 12 being waived and the testimony taken as though complying in full with the requirements of that rule.

BRAWLEY & BARNWELL,
For D. H. Chamberlain, Receiver of S. C. R'y Co.
CLAUDIAN B. NORTHROP,
Attorney for Behlmer.

83 CHARLESTON, S. C., *June 24th*, 1893.

The sending of written testimony having been unavoidably delayed by the absence of Mr. Northrop from the State, it is hereby agreed that the said testimony be forwarded with the request that it be received by the commission as though in due time, and we waive all questions of fine or regularity as to filing the same.

CLAUDIAN B. NORTHROP.
JOS. W. BARNWELL.

Mr. THEO. NATHAN, being duly sworn, says he affirms as follows:

Mr. Northrop objects to all testimony, except from Memphis itself, as to freight emanating from any other points, such as Chicago, New York or other markets as being irrelevant and immaterial, and objects to all opinions of witnesses as to the effect upon traffic from Memphis to Charleston, which a reduction of the rate to Summerville, S. C., might produce, and all opinion testimony. This will apply to all witnesses.

Question by Mr. Barnwell, Answers by Mr. Nathan.

Q. What business are you in?
A. In the grain business.
Q. Here in Charleston?
A. Yes, sir.
Q. How long have you been in the grain business?
A. A year and some months.
Q. Have you ever brought hay from Chicago, via the lakes, canal and ocean, and, if so, at what rate did you pay?
A. I have never brought hay from Chicago to Charleston, but have to Savannah, Ga., which takes the same rate as Charleston. I do not remember what rate I paid at the time.
Q. Do you know what the rates have been to Charleston, via the lakes, canal and ocean from Chicago?
A. As late as last June the rate was twenty-two (22) cents per 100 pounds on class D, which embraces grain, corn, oats and hay.
Q. What are the rates now, about the same?
A. I think they are the same.
Q. Do you know what the rate is by rail from Memphis to Charleston on hay and grain?
A. Nineteen (19) cents per 100 pounds.
Q. How does most of the hay and grain come to Charleston from Memphis?
A. It varies according to the season.
Q. What do you mean by that?
A. I mean that in the summer months we can always get grain from Chicago by way of the lakes, and steamers from New York down, and the winter we could not get it by that route, because of the ice on the lakes, but we can get it in the winter from Chicago by rail to New York and steamers down. While the ice is in the lakes, the rate of freight is usually not as low as in the summer

season, when the lakes are clear, and we have straight lake,
84 canal and ocean freights. During the season that we have in these latter, we usually buy from the West.

Q. What determines the markets into which you will buy?

A. The lowest freight rates.

Q. If the freight rate by rail from the West, from Memphis, for instance, were raised above the present rates, what would be the effect upon your ordering goods at the West?

A. I have to buy them all from points where I could utilize the lakes, canal and ocean route, that is, if the rates were raised very much higher than they are at present. Of course a cent or two would make no difference.

Q. Does a great deal of hay and grain come from Chicago by canal, lake and ocean route to Charleston at times?

A. A good deal. I bought last year upwards of a hundred (100) car-loads in a month in Chicago, and in the last two weeks there has been received here two cargoes of corn by schooner, from Virginia. Last year I brought four cargoes by schooner from Baltimore, Norfolk and Virginia points. During that time I could buy corn in the West and bring by rail to compete with the prices laid down by water shipment. Some time ago I also brought hay from Baltimore at prices that enabled me to place it here for less money than it would have cost me had I brought it from Memphis or any other western points.

Q. What regulates the rail rates to Charleston on grain and hay from Memphis and the West?

A. Water competition.

Cross-examination by Mr. NORTHROP:

Q. Does not the price of the article have something to do with the purchasing market?

A. The rate delivered here has nothing to do with it.

Q. That is not answering my question. Do you get better prices as a rule in the West than you do in New York?

A. I cannot say. I have at times brought grain and hay for less money in Baltimore, also New York and in Boston than I could buy at other western points at the same periods.

Q. Do you not usually get cheaper prices in the West?

A. We do not consider western prices at all, because we nearly always buy on delivered prices and not at what is termed f. o. b. prices, consequently it is the matter of freight rates that affect our prices altogether.

Q. If you could get grain for ten ($10.00) dollars per ton in Memphis, and it was selling for eighteen ($18.00) dollars per ton in New York you would buy in New York, if you could get cheaper freight rates to Charleston? Would you not?

A. I would buy from wherever I could deliver the cheapest.

Q. Is it not true that the price of this stuff is less (disregarding freight rates for the present) in the West than they are in New York on this article as the rule?

A. Yes; as a rule they are.

Q. Do you order from the West or from New York, as a rule?

85 A. As a rule I order from the West, because all things being equal I prefer to have my shipments by railroad delivery.

Q. Is not the proportion of grain and hay that comes by lake and rail from Chicago relatively small in comparison to the whole volume that reaches this point during the year?

A. Yes, by far the greater part of grain and hay that comes to Charleston, comes directly from the West by rail.

Q. Can you get grain from Memphis here by water? Do you ever bring shipments that way?

A. I have brought it from Galveston.

Q. My question is: Did you ever bring any from Memphis here by water?

A. No.

Q. Did you ever hear of anybody else doing so?

A. No, I don't know that I ever have.

It is admitted that Mr. W. H. Jones, who is a large grain and hay merchant in the city of Charleston, if present, would testify that if the rates on grain from Memphis to Charleston were raised materially from the present rate of nineteen (19c.) cents per 100 pounds, that is to say, more than one or two cents per 100 pounds, that grain and hay would be brought to Charleston by canal, lake and ocean from Chicago, rather than by all rail from Memphis.

Mr. Jones will admit that he has never brought any hay or grain from Memphis by water to Charleston.

This is subject to the objection like other testimony taken this morning as irrelevant, immaterial and a matter of opinion.

INTERSTATE COMMERCE COMMISSION.

I, Edward A. Mosely, secretary of the Interstate Commerce Commission, do hereby certify that the foregoing is a correct and complete copy of the original testimony and extracts of the exhibits in case No. 362, before said Interstate Commerce Commission of H. W. Behlmer against The Memphis and Charleston Railroad Company *et al.*

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the commission, this 14th day of December, 1894.

[SEAL.] EDW. A. MOSELY, *Secretary.*

Deposition.

UNITED STATES OF AMERICA:

In the United States Circuit Court, Fourth Circuit. In Equity.

H. W. BEHLMER, Plaintiff,
vs.
THE LOUISVILLE AND NASHVILLE R. R. Co. ET AL.

This deposition taken before me, Mastin S. Decker, a notary public, is by consent taken without the usual formalities subject
86 to the right of defendants to file such cross-interrogatories as they may be advised within the time agreed upon.

Personally appeared before me J. M. SMITH, who deposes as follows, to wit:

Question 1. State your name, occupation and residence.

Answer. J. M. Smith, assistant auditor of the Interstate Commerce Commission. Residence, Washington, D. C.

Question 2. How long have you occupied your present position, and what was your previous business?

Answer. For about the last seven and a half years I have occupied my present position. Prior to that time I was connected with the traffic department of the Louisville and Nashville railroad, for about thirteen years, up to 1888.

Question 3. Are you familiar with the tariffs, rates and methods of making rates from what is known as the Central Traffic Association territory, to the trunk-line territory and the New England States?

Answer. I am generally familiar with the basis on which the rates are made in the territory mentioned.

Question 4. Describe the territory known as the Central Traffic Association territory, and outline it on the map marked "Exhibit A," attached to this deposition.

Answer. The Central Traffic Association is formed by railway companies located within the area bound as follows:

On the east by the western termini of the trunk lines, whose termini are Toronto, Canada, Suspension Bridge, Niagara Falls, Tonawanda, Black Rock, Buffalo, East Buffalo, Buffalo Junction, Dunkirk and Salamanca, N. Y.; Pittsburg and Allegheny, Pa.; Bellaire, O.; Wheeling and Parkersburg, W. Va., and Ashland, Ky. On the north by the line of the Grand Trunk railway from Toronto to Fort Gratiot, including the points thereon, thence via the Great Lakes to Chicago. On the west by a line through Joliet and Streator, to Peoria, thence via T. P. & W. R'y to East Burlington, thence via the Mississippi river to its junction with the Ohio river. On the south by the Ohio river.

Question 5. Describe the trunk-line territory and outline it on map marked "Exhibit A" attached to this deposition.

Answer. The territory of the Trunk Line Association includes the territory west of New England and east of, including Toronto, Suspension Bridge, Niagara Falls, Tonawanda, Black Rock, Buffalo, East Buffalo, Buffalo Junction, Dunkirk, Salamanca, Erie, Pittsburg, Bellaire, Wheeling, Parkersburg and Charleston, W. Va.

Question 6. What is the general system of making rates on all classes of freight east bound, from what is known as the Central Traffic Association territory, to the trunk-line territory and New England?

Answer. The rates from the Central Traffic Association territory to the trunk-line and New England territory are made as follows:

The rates from Chicago to New York are fixed by what is known as the joint committee, which is a committee representing
87 the Trunk Line and Central Traffic Associations, and also includes certain New England roads, and others which are not members of either of the above-mentioned associations. These rates between Chicago and New York city are the basis of all other rates from points in this Central Traffic territory to eastern points, Boston being made certain differentials higher than New York city, and Baltimore, Philadelphia and other principal points certain differentials lower. Rates to local points in these territories are made either the same as the above-mentioned points, or certain differentials higher or lower. Intermediate points on the direct line are usually made the same as the terminal points, or lower. For instance, points in the vicinity of New York, Philadelphia, Boston and Baltimore, usually take the same rates as these cities, or a lesser rate, the farther west they happen to be situated, until the western boundary of the trunk-line territory is reached. From all other points in the Central Traffic Association territory than Chicago, the rates to the trunk line, New England territory, are made a percentage of the Chicago and New York rate. For instance, Peoria, Ill, which is west of Chicago, is a 110 per cent. of this rate, or 10 per cent. higher than Chicago. Terre Haute, Ind., takes a hundred per cent. of the Chicago rate, or the same as Chicago; Columbus, O., takes 77 per cent. of the Chicago rate, being farther east.

Question 7. How does this system affect long and short hauls?

Answer. Under this system throughout the territory mentioned the rates for shorter distances are generally not higher than for the longer distances; the intermediate points usually taking the same or lower rate than the principal terminal point.

Question 8. Give some instances of intermediate points taking the same rate as the terminal.

Answer. Exhibit B shows certain intermediate points taking the same rates as New York, Philadelphia, Baltimore and Boston, also the distances from those points and the roads on which said points are situated.

Question 9. According to tariffs filed by the carriers with the Interstate Commerce Commission, state the rates on grain from Chicago to Buffalo, Albany, New York, Boston, Philadelphia and Baltimore, from January 1st, 1894, to the present date; also the distances, and the rate per ton per mile received by the roads for carriage.

Answer. Exhibit C shows the rate on grain from Chicago to the points mentioned for the period mentioned, also the distances via the routes given therein, also the rate per ton per mile.

Question 10. According to the tariffs filed by the carriers with the Interstate Commerce Commission, state the rates on grain from

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Memphis to Baltimore, Philadelphia and New York, also to Summerville and Charleston, from January 1st, 1894, to the present date, also state distances and rate per ton per mile?

Answer. Exhibit D shows the rates from Memphis to the points named for the period named, also the distances via the routes given therein, also the rate per ton per mile.

88 Mr. Northrop, counsel for plaintiff, states that these exhibits are presented subject to any correction which the counsel for defendants may make.

(Signed) J. M. SMITH.

UNITED STATES OF AMERICA, }
State of South Carolina, City of Washington, } *ss.*:

Personally appeared before me, Martin S. Decker, a notary public, in and for said District and city, J. M. Smith, who on oath says the contents of the foregoing deposition are true.

J. M. SMITH.

Sworn to before me, in the city of Washington, this 20th day of May, A. D. 1895.

(Signed) MARTIN S. DECKER,
[NOTARIAL SEAL.] *Notary Public, District of Columbia.*

(Here follows map marked p. 88*a*.)

EXHIBIT B.

Statement.

INTERSTATE COMMERCE COMMISSION,
AUDITOR'S OFFICE, WASHINGTON, *May* 17, 1895.

Points on the Pennsylvania railroad taking New York rates on shipments of freight from Central Traffic Association territory:
Elizabeth, N. J., 14 miles west of New York.
Menlo Park, N. J., 24 miles west of New York.
Trenton, N. J., 56 miles west of New York.
Points on the Pennsylvania railroad taking Philadelphia rates:
Frazer, Pa., 24 miles west of Philadelphia.
Columbia, Pa., 80 miles west of Philadelphia.
Points on the Baltimore and Ohio railroad, taking Baltimore rates:
Annapolis Junction, Md., 17 miles west of Baltimore.
Washington, D. C., 40 miles west of Baltimore.
Rockville, Md., 56 miles west of Baltimore.
Harper's Ferry, W. Va., 95 miles west of Baltimore.
Cumberland, Md., 192 miles west of Baltimore.
Points on the Boston and Albany railroad, taking Boston rates:
Worcester, Mass., 44 miles west of Boston.
Brookfield, Mass., 67 miles west of Boston.
Springfield, Mass., 99 miles west of Boston.
Westfield, Mass., 108 miles west of Boston.
Dalton, Mass., 145 miles west of Boston.
Chatham, N. Y., 177 miles west of Boston.

INTERSTATE COMMERCE COMMISSION,
AUDITOR'S OFFICE, *May* 17, 1895.

EXHIBIT C,

Showing Rate on Grain and Rate per Ton per Mile from January 1st, 1894, to Present Date.

From CHICAGO, ILL., to—	Mileage via L. S. & M. S., 540 miles.		Mileage via L. S. & M. S., N. Y. C. & H. R., 837 miles.		Mileage via Penna., 912 miles.		Mileage via L. S. & M. S., N. Y. C. & H. R., B. & O., 1,039.		Mileage via Penna., 822.		Mileage via B. & O., 859.	
	BUFFALO, N. Y.		ALBANY, N. Y.		NEW YORK.		BOSTON.		PHILADELPHIA.		BALTIMORE.	
	Rate (in cents) per 100 lbs.	Rate per ton per mile.	Rate (in cents) per 100 lbs.	Rate per ton per mile.	Rate (in cents) per 100 lbs.	Rate per ton per mile.	Rate (in cents) per 100 lbs.	Rate per ton per mile.	Rate (in cents) per 100 lbs.	Rate per ton per mile.	Rate (in cents) per 100 lbs.	Rate per ton per mile.
January 1, 1894	15	.0056	24	.0057	25	.0055	27	.0052	23	.0056	22	.0051
February 27, 1894	12½	.0046	19	.0045	20	.0044	22	.0042	18	.0044	17	.004
November 12, 1894	15	.0056	24	.0057	25	.0055	27	.0052	23	.0056	22	.0051
February 4, 1895	12½	.0046	19	.0045	20	.0044	22	.0042	18	.0044	17	.004

Rates to Buffalo, Albany, and Boston shown in L. S. & M. S. tariff, No. 39, of November 12, 1894. (File No. 7977.)
Rates to New York and Philadelphia shown in Star Union Line joint tariff, No. 111, of February 11, 1895. (File No. 2115.)
Rates to Baltimore shown in B. & O. tariff C, No. 216, of February 4, 1895. (File No. 8692.)

INTERSTATE COMMERCE COMMISSION,
AUDITOR'S OFFICE, *May* 18, 1895.

EXHIBIT D,

Showing Rates on Grain and Rate per Ton per Mile from January 1, 1894, *to Present Date.*

From MEMPHIS, TENN., to—	Mileage via Bristol, Lynchburg, Washington, 971. BALTIMORE.		Mileage via Hagerstown and Harrisburg, 1,121. PHILADELPHIA.		Mileage via Hagerstown and Harrisburg, 1,211. NEW YORK.	
	Rate (in cents) per 100 lbs.	Rate per ton per mile.	Rate (in cents) per 100 lbs.	Rate per ton per mile.	Rate (in cents) per 100 lbs.	Rate per ton per mile.
January 1, 1894	31	.0064	32	.0057	34	.0056
March 2, 1894	25	.0051	26	.0046	28	.0046
November 12, 1894	28	.0058	29	.0052	31	.0051
March 14, 1895	31	.0064	32	.0057	34	.0056

Rates shown in M. & C. joint f't tariffs, No. 11, of January 1, 1894; No. 14, of February 5, 1894, and No. 20, of March 14, 1895.

From MEMPHIS, TENN., to—	Mileage. M. & C. 310, E. T., V. & Ga. 152, Ga. 171, S. C. 115 = 748. SUMMERVILLE, S. C.		Mileage. M. & C. 310, E. T., V. & Ga. 152, Ga. 171, S. C. 137 = 770. CHARLESTON, S. C.	
	Rate (in cents) per 100 lbs.	Rate per ton per mile.	Rate (in cents) per 100 lbs.	Rate per ton per mile.
January 1, 1894	28	.0075	19	.0049
March 6, 1894	28	.0075	14	.0036
April 6, 1894, to present date	28	.0075	19	.0049

Rates shown in M. & C. f't tariffs, No. 26, of December 8, 1892 (file No. 2148), and No. 27, of February 18, 1895 (file No. 2406).

91 *Stipulation.*

In the Circuit Court of the United States for the District of South Carolina.

H. W. BEHLMER
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL.

In this cause it is stipulated by counsel that the following-described documents, offered in evidence by the defendants, may be filed and used as evidence on the hearing of the cause, subject to all objections as to their relevancy and competency:

1st. Agreement of the Southern Railway and Steamship Association, adopted January 14, 1892, marked Exhibit "A" to this stipulation.

2nd. Tariff of Erie and Western Transportation Company, Anchor line, lake and rail, via Erie and Pennsylvania railroad, it being joint east-bound freight tariff No. 11, taking effect August 15, 1892, marked Exhibit "B" to this stipulation.

3rd. Pages 114 and 115 of 20th report of the railroad commission of Georgia, October 15, 1892, marked Exhibit "C" to this stipulation.

4th. South Carolina Railway Company local freight tariff No. "C 4," taking effect June 1, 1889, and which was approved by the railroad commission of the State of South Carolina, marked Exhibit "D" to this stipulation.

5th. Extracts from annual report of the South Carolina Railway Company to the railroad commission of the State of South Carolina, for the year ending June 30th, 1892, marked Exhibit "E" to this stipulation.

ED. BAXTER,
Solicitor for L. and N. R. R. Co. et al.
CLAUDIAN B. NORTHROP,
Attorney for Plaintiff.

EXHIBIT A TO STIPULATION OF COUNSEL.

The Southern Railway and Steamship Association.

Agreement.

This agreement, made this 14th day of July, A. D. 1892, by the parties whose signatures are hereunto attached, witnesseth that—

Whereas the establishment and maintenance of tariffs of uniform rates, to prevent unjust discriminations, such as necessarily arises from the irregular and fluctuating rates which inevitably attend the separate and independent action of transportation lines, is important for the protection of the public; and

Whereas it is deemed to be to the mutual advantage of the public

and the transportation companies, that business in which
92 they have a common interest should be so conducted as to secure a proper corelation of rates, such as will protect the interests of competing markets, without unjust discriminations in favor of, or against any city or section; and

Whereas these objects can be attained by the co-operation on the part of the various transportation lines, engaged in the traffic of the territory south of the Potomac and Ohio rivers and east of the Mississippi river; and

Whereas such co-operation is absolutely necessary to a strict compliance with the requirements of the act of Congress, entitled "An act to regulate commerce."

Now, therefore, in order to secure such co-operation among the said transportation lines, and to provide means for the prompt adjustment of the differences which may arise between them, by placing the conduct of all the traffic common to two or more companies, under well-defined rules and regulations which will insure the maintenance of rates, it is mutually agreed as follows:

Article first.

SECTION 1. The association herein formed shall be styled the Southern Railway & Steamship Association.

Article second.

SECTION 1. The territory of this association shall be that territory lying south and west of the Virginias, south of the Ohio river, and east of the Mississippi river. The traffic subject to this agreement shall be all business for which two or more of the parties hereto compete, having origin or destination within this territory. It is understood that the following traffic is not covered by this agreement: (1.) Traffic carried between points on the Ohio and Mississippi rivers, and (2) traffic between points on the designated northern and western boundary lines and points outside of the defined association territory.

It is further understood and agreed that traffic to or from a local point on any line shall be considered local to that line throughout its transportation by such line, and, so far as that line may be concerned, shall not be subject to this agreement, provided that rates to or from such local point shall not be made so as to cut the rates fixed under the rules of the association to or from the nearest competing point through which such local traffic may pass.

SECTION 2. For the mutual protection of the various interests, and for the purpose of securing the greatest amount of net revenue to all the companies parties to this agreement, it is agreed that what are termed western lines shall protect the revenue derived from transportation by what are known as eastern lines, under the rates as fixed by this association, so far as can be done by the exaction of local rates, and that eastern lines shall, in like manner, protect like revenue of western lines.

93 SECTION 3. That a line drawn from Toronto on the north shore of Lake Ontario through Lewiston, Niagara Falls, Buf-

falo, Erie City, and the line of the Alleghany Valley railroad to Pittsburg, thence down the Ohio river through Wheeling and Parkersburg to Huntington, W. Va., be made the dividing line between eastern and western lines for the territory hereinafter outlined, it being understood that points on this line shall be common to lines through the eastern and western gateways, together with such points adjacent thereto, from which the rates shall be the same as from the points above named through the gateways of Cincinnati and Louisville. The rate committee shall agree upon the common points adjacent to said line as provided above, or failing to agree, such common points shall be designated as provided under this agreement where the rate committee fails to agree. That western lines shall not make joint rates from points east of that line and common points agreed upon from any point east of a line drawn from Chattanooga through Birmingham, Selma and Montgomery to Pensacola, Fla.

SECTION 4. The eastern lines, including the Richmond and Danville railroad, the East Tennessee, Virginia and Georgia railway, and the Norfolk and Western railroad, shall not make joint rates on traffic from points west of the line designated in section 3 and the common points agreed upon to any points on or west of a line drawn from Chattanooga through Athens, Augusta and Macon to Live Oak, Fla.

SECTION 5. The traffic from points on the dividing line and common points designated in section 3, may be carried by either the eastern or western lines, but only at such rates as may be agreed upon.

Article third.

SECTION 1. The representatives of the several companies, members of this association, shall meet in convention annually on the second Wednesday in June, in the city of New York, or at such other place as may be mutually agreed upon, and special meetings may be called at any time as hereinafter provided.

Article fourth.

SECTION 1. The business to be transacted in general convention shall be confined to the election of officers, fixing their salaries, the representation of members on the executive board, and the adjustment of such other matters as cannot be properly determined by the executive board with the aid of the board of arbitration. Each company, a member of the association, shall have one vote. Two-thirds of the whole vote of the members present shall be required to make action of the convention binding. Companies members of the association may be represented in the convention by the president, vice-president, general manager, traffic manager, superintendent, or general freight agent, in person or by proxy, provided
94 such proxy presents to the secretary a properly attested power of attorney. In case of more than one nomination being made for any office, the election shall be by ballot.

Article fifth.

SECTION 1. The following officers shall be elected at the annual meeting, and shall hold their offices until the next annual meeting, and thereafter until their successors are elected: A president, a vice-president, a commissioner, and three arbitrators. A secretary shall be appointed by the commissioner, subject to confirmation by the executive board.

SECTION 2. In the event of a vacancy occur-ing in any elective office, the president may fill the vacancy until a general meeting can be convened to elect a successor, and such meeting shall be called by the president within twenty days after the vacancy occurs.

Article sixth.

SECTION 1. The East Tennessee, Virginia and Georgia railway, Norfolk and Western railroad; Richmond and Danville railroad; Seaboard and Roanoke railroad; Central Railroad of Georgia, including the Port Royal and Augusta railway; Georgia railroad; Western and Atlantic railroad; Wilmington and Weldon railroad; Atlanta and West Point railroad, and Western Railway of Alabama; Savannah, Florida and Western railway; Old Dominion Steamship Company; Ocean Steamship Company; Merchants' and Miners' Transportation Company; Cape Fear and Yadkin Valley railway; Cincinnati, New Orleans and Texas Pacific railway; Illinois Central railroad; Kansas City, Memphis and Birmingham railroad; Louisville and Nashville railroad; Louisville, New Orleans and Texas Railway and Newport News and Mississippi Valley Company; Mobile and Ohio railroad; Nashville, Chattanooga and St. Louis railway; Alabama Great Southern railroad; Baltimore, Chesapeake and Richmond Steamboat Company; Baltimore Steam Packet Company; Georgia Pacific railway; Georgia Southern and Florida railroad; Memphis and Charleston railroad; South Carolina railroad; Charleston and Savannah railroad; Clyde Steamship Company, and such other lines or companies as may execute this agreement shall each designate a representative, who shall be authorized to represent them in all matters of business with the association or its members. The several representatives so designated and such other representatives of members of the association as may be designated by the executive board, shall constitute the executive board, of which the commissioner shall be chairman. If any company or line which is entitled to a representative fails to appoint one, or if their representative be not present at any meeting of the executive board, such company or line shall be represented by the commissioner.

Article seventh.

SECTION 1. The executive board shall meet at the call of the commissioner, whenever and wherever in his judgment it is necessary, or when any three members of the board request it; but all such calls must state the object of the meeting, and the subjects to be acted upon by the board. All absent members shall be represented

by the commissioner, whose duty it shall be to make himself familiar with their views and interests, so that he can represent them properly; and votes cast by the commissioner for absent members, at any meeting, on any subject stated in the call, shall have the same force and effect in binding such members as if cast by them in person. Other subjects than those mentioned in the call may be considered and acted on in the meeting of the executive board, but the assent of absent members must be obtained, or a decision of the board of arbitration, before such action becomes binding upon them. The executive board shall have jurisdiction over all matters relating to the traffic covered by this agreement, but shall act only by unanimous consent of all its members. In the event of a failure to agree, the questions at issue shall be settled by the board of arbitration as hereinafter provided for.

SECTION 2. The principle of an apportionment of business subject to arbitration shall be recognized in the operations of the association so far as this can be lawfully done.

Article eighth.

SECTION 1. The executive board shall have the right at their discretion to appoint committees and other subcommittees, either of their own number or from among the officers and agents of the companies, members of the association, and to delegate to such subcommittees jurisdiction over such matters as may be specially committed to their charge. With a view of a proper relative adjustment of all rates, and especially a proper relative adjustment of rates on similar articles from the East and West to common territory, the rate committees shall have sole authority to make all rates and classifications on all traffic covered by this agreement, subject to decision of the commissioner, the executive board, or board of arbitration, as hereinafter provided, in case such rate committees cannot agree; but if the rate committees shall fail or omit to make rates on any traffic covered by this agreement, the commissioner shall have authority to make such rates, it being the intention that there shall be properly authenticated tariffs of rates on all such traffic.

SECTION 2. Subcommittees shall only act by unanimous consent, and, failing to agree, the questions at issue may, upon demand of any member, be referred to the executive board for action at their next meeting, or the votes of the members of the executive board may be taken separately and apart by correspondence, and such questions may be submitted direct to the board of arbitration, when so authorized by a majority of the executive board.

96 SECTION 3. The commissioner shall be *ex officio* chairman of all subcommittees, and as such shall be the medium of communication between subcommittees and the executive board. Absent members of subcommittees shall be represented by the commissioner, as in case of absent members of the executive board. During the interim between the reference of any matter of difference from a subcommittee to the executive board, and the final determination of such matter, the commissioner, if he deem it a

matter requiring prompt action, shall have authority to decide it temporarily, and his decision shall be binding on all parties until reversed by the executive board or by arbitration.

Article ninth.

SECTION 1. The executive board shall have authority to make from time to time such rules and regulations, not inconsistent with this agreement, as may be necessary to secure a systematic conduct of the affairs of the association and attain the objects for which it is formed.

Article tenth.

SECTION 1. The president shall preside over all general meetings of the association, certify to the record of such meetings, and communicate the proceedings to all the members. He shall call a general meeting of the association whenever he is requested to do so by three members of the executive board, or whenever it is in his judgment necessary.

SECTION 2. The vice-president, in the absence of the president, shall be empowered to perform all the duties of the president.

Article eleventh.

SECTION 1. The board of arbitration shall hear and determine all questions which may be submitted to them under this agreement, or by consent of the parties, and the decisions of the said board shall be final and conclusive.

Article twelfth.

SECTION 1. The secretary shall make complete and accurate records of the proceedings of all general meetings of the association, the originals of which shall be preserved in the general office of the association, and copies furnished to each member. He shall also act as secretary to the board of arbitration, to the executive board, and to all committees hereinafter provided for, and preserve similar records of their proceedings, and perform such other duties as may be assigned him by the commissioner.

Article thirteenth.

SECTION 1. The commissioner shall be the chief executive officer of the association, and as a representative of its members, both severally and jointly, shall act for them in all matters that come within the jurisdiction of the association, in conformity with the requirements of his contract, and the instructions of the executive board and committees herein provided for, but exercising this discretion in all cases which are not provided for either by this agreement or by the executive board and committees acting under its authority and sanction. When directed by the executive board, the commissioner shall also take charge of the reports and claims, and appoint such clerks and claim agents as may be necessary, and

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charge up the expense to the roads interested in the business, on an equitable basis, managing the business for the benefit and at the cost of the companies interested. He shall also have authority to reduce the rates when necessary to meet the competition of lines or roads not parties to this agreement, and of lines parties to this agreement, when such lines fail to maintain the rates as established under the agreement, and he may at the same time make corresponding reductions from other points from which relative rates are made. He shall have such authority over the traffic officers and their subordinates and over the accounting departments of the parties hereto as may be necessary to enforce the terms of this contract relative to the maintenance of rates, and to require information relating to the traffic to be furnished to him in such form or manner as he may deem necessary. He shall have access, either in person or by deputy to the books, papers, correspondence, etc., of any of the officers, agents or employees of the parties hereto, that relate to the freight traffic covered by this agreement.

Article fourteenth.

SECTION 1. The commissioner shall keep such accounts of the traffic covered by this agreement, and make such report of the same, as may be directed by the executive board.

Article fifteenth.

SECTION 1. All disbursements of the funds of the association shall be made by the commissioner, who shall give bond with security, in such amount as shall be satisfactory to the executive board; that he will duly and properly account for all moneys of the association, or belonging to members thereof, which may in any manner come into his possession or under his control. No payments shall be made except on properly receipted vouchers which shall be held subject to inspection by the executive board, or such person or persons as may be appointed by them for that purpose.

Article sixteenth.

SECTION 1. In order to provide for the prompt payment of any fines that may be assessed against any member of this association for violating its rules, each company shall deposit with the commissioner an amount equivalent to four ($4.00) dollars for
98 each mile of the road operated by said company under the provisions of this agreement, or in case where a company operates a water line, four (4.00) dollars for each mile allowed as a prorating distance in the division of through rates; provided, such amounts shall not exceed in the aggregate the sum of five thousand ($5,000) dollars or less than five hundred ($500) dollars for any one company; but, in all cases where fines are assessed, the commissioner is hereby authorized to draw at sight on the parties against whom such fines are assessed for the full amount of said fines, and each company, party to this agreement, hereby binds itself to

promptly pay such drafts, it being the intent and meaning of this section that the deposit herein provided for shall not be diminished by reason of the payment of any fines that may be assessed against a company making such deposit.

Article seventeenth.

SECTION 1. The commissioner shall be furnished with copies of all manifests for traffic covered by this agreement, such copies to be forwarded at the time the shipments to which they appertain are made, and shall show the original shipping point and through rates, and also the divisions thereof so far as such divisions are controlled by this agreement, and abstracts of all such manifests shall be furnished to the commissioner at the expiration of each month; but it is understood that members of the association shall not have access to any such manifests, or be furnished with the names of consignors or consignees. The tonnage books of every company in the association shall be open at all times to the inspection of the commissioner or such agents as he may from time to time appoint, for the purpose of enabling him to get a complete record of all traffic covered by this agreement.

Article eighteenth.

SECTION 1. Copies of all rates that may from time to time be agreed upon, or fixed in the manner provided, shall be furnished promptly to the auditors and other officers of the parties to this contract, and they shall see that the rates are enforced in conformity therewith, and that no variations are made from such rates or manifests, by voucher or otherwise.

Article nineteenth.

SECTION 1. That all-rail rates to and from the ports of Boston, Providence, New York, Philadelphia and Baltimore, shall be higher than the rates by water or combined water and rail lines by the present differentials as established by the board of arbitration July 19, 1889, and subject to the Southern Railway and Steamship Association classification.

SECTION 2. Water lines or combined water and rail lines may insure against marine risks by issuing insured bills of lading between the above-named ports and points to which they were being applied on January 1st, 1892, provided they give two weeks' written notice to the commissioner, naming the points to which they will issue insured bills of lading.

SECTION 3. No water line or combined water and rail line shall assume the cost of insurance against marine risk in any other manner than herein provided for, viz., by the issue of insured bills of lading. It is, however, distinctly understood and agreed that no reduction of the established tariff rates, rebates or consideration of any kind, shall be given or offered to influence shippers, or to secure their preference for any road or line.

SECTION 4. The above-named differentials as between all-rail lines and water or combined water and rail lines, including the territory to which they apply, shall not be changed except by arbitration, which may at any time be called for by any party to this agreement.

Article twentieth.

SECTION 1. The parties to this agreement who control all-rail lines through Alexandria, Hagerstown, Richmond or Norfolk, agree to protect the water lines or combined water and rail lines upon the basis of the above-named differentials, or such other differentials as may be fixed by arbitration, in making rates between points in the territory covered by this association and all interior points in the Northern and Eastern States east of the territorial line named in article second, section 3, of this agreement, unless when and where the combinations of locals through the gateways of Cincinnati, Louisville, Ashland, Hagerstown, Alexandria, Richmond or Norfolk makes a lower rate; it being the intent of this agreement to protect the water or combined water and rail lines to the extent of the differentials named in article nineteenth, or such other differentials as may be fixed by arbitration in the construction of all-rail rates between points in Northern and Eastern States east of the territorial limit above mentioned.

SECTION 2. It is also agreed that in cases where a combination of locals to and from interior points, by rail lines, make lower totals than the established water lines, port rates plus differentials, the rates may be by all lines the lowest combination, but shall not be less than such combination.

SECTION 3. In all cases changes of rates made under above provisions shall be made by the rate committee or the commissioner, who shall promptly notify all parties interested.

Article twenty-first.

SECTION 1. The commissioner, with the approval of the executive board, shall organize such a system for the rendition of tonnage and revenue reports of the traffic covered by this agreement as shall enable the commissioner to be at all times fully informed of the movements thereof, and the observance of rates established therefor, in order that he may detect promptly any violation of rates, and keep each company or line informed of the action of the other companies or lines. For these purposes, the commissioner, at his discretion, may appoint agents to examine the books of the members of the association, and inspectors of the weights and classifications, who shall at all times have access to and be permitted to examine goods. Any losses or damages resulting to initial carrier from the opening of packages by inspectors, shall be prorated on the basis of revenue. The expenses of such agents and inspectors shall be distributed among the members as hereinafter set forth. Tonnage and revenue statements shall be rendered monthly to each member of the association, and also annually on the 30th day of April, in a report to be made by the commissioner

at the expiration of each year and distributed to the members at least two weeks before the annual meeting.

Article twenty-second.

SECTION 1. All measures necessary to carry out the purpose of this agreement shall be taken jointly by the parties hereto, and should any question arise upon which they cannot agree, in relation to the terms of this contract, or to any matter arising thereunder, it shall be decided by arbitration, as herein provided, it being one of the fundamental principles of this contract that no party shall take separate action in any matter affecting the intent of one or more of the other parties contrary to the spirit and interest of this contract, and that all differences relating to the establishment, adjustment and maintenance of rates upon traffic covered by this contract, shall be adjusted by arbitration.

Article twenty-third.

SECTION 1. Whenever rates have been fixed by the rate committee, the commissioner, the executive board, or by arbitration, there shall be no reduction from such rates, without the consent of the commissioner. No member of the association shall reduce such rates directly or indirectly, by any special rate, rebate or drawback, or by payment of commissions, or by reductions on manifests, or by combination of local rates, or by rebilling, or by underbilling weights, or by any consideration in the way of free transportation, or in any manner, or by any device whatsoever.

SECTION 2. It is distinctly understood and agreed that the maintenance of rates as established under the rules of the association is of the very essence of this agreement, and the parties hereto pledge themselves to maintain them, and to require all their connections to maintain such rates, and in the event of any company or line or its connections not members of the association failing to conform to this obligation, the other parties in interest pledge themselves to increase their proportions of through rates sufficiently to protect the authorized rates, and to apply full local rates upon all traffic
101 subject to the association agreement coming from or going to such offending lines, whenever required by the commissioner to do so.

SECTION 3. Whenever the commissioner shall have reason to believe that the rates as established under the rules of the association are not being fully maintained, or that the rules or regulations or provisions of the agreement designed to secure their maintenance are not being complied with by any line or company, member of this association, it shall be his duty to make a full investigation of the facts in such cases, and if, in his judgment, there has been any violation of the agreement on the part of any member or members of this association, he shall submit the evidence in such case to the board of arbitration, and if the board of arbitration shall find, after a full hearing of the case, that any member is or has been guilty of violating this agreement, it shall impose such penalties therefor as

it may deem proper and commensurate with the injuries inflicted upon the association and of competing lines parties to this agreement; provided the infliction and enforcement of one penalty shall not prevent the infliction and enforcement of other penalties in case of continued or further violation of the agreement by the same member. The commissioner shall enforce such penalties, making use, if necessary, of the fund provided for that purpose. Any surplus over and above the amount that may be awarded by the board of arbitration to indemnify any members for losses sustained, shall be applied to the payment of the expenses of the association.

SECTION 4. The board of arbitration shall, from time to time, make or amend rules of procedure for the trial of such cases and the submission of arguments in cases referred to it for decision, as it may deem proper.

SECTION 5. Under any of the circumstances mentioned in section 3, the commissioner shall immediately issue instructions to the member or members charged with the violation, as he may deem advisable, pending action of the board of arbitration. If the member fails to comply with such order, the commissioner may take such steps for the protection of the association as he may deem advisable, with the approval of a majority of the executive board

Article twenty-fourth.

SECTION 1. The expenses of the association shall be assessed upon the members *pro rata*, according to their gross revenue derived from the traffic covered by the agreement, each member to advance at the beginning of the year three hundred ($300) dollars towards its proportion of the expenses.

Article twenty-fifth.

SECTION 1. This contract takes effect the — day of ——, 1892, and shall terminate on the thirty-first day of July, 1893, and the fiscal year of the association shall terminate on the first day of April, 1893.

E. B. 4062 8 9 92. 800

THE ERIE & WESTERN TRANSPORTATION COMPANY.

ANCHOR LINE [Small Anchor.] LAKE AND RAIL.

VIA ERIE AND

PENNSYLVANIA RAILROAD.

JOINT EAST-BOUND FREIGHT TARIFF, No. 11.

This Tariff of Rates is to be used in connection with, and subject to, the Official Classification and all Supplements thereto in effect at the time of shipment, including all Supplements and Special Rates issued by this Company respecting prohibited articles, &c.

TAKING EFFECT AUGUST 15th, 1892.

Subject to change without notice. Superseding Rates named in Tariff No. 9.

FROM CHICAGO AND MILWAUKEE.

TO	Rates in Cents per 100 Pounds.								
	1st Class.	2d Class.	3d Class.	4th Class.	5th Class.	6th Class—Hay (other than Grain and its products).	Grain Products, as enumerated below.* (Grain in bulk excepted.)	Wool in sack, C. L.	Rags and Paper Stock (Waste and Scrap Paper) in bales, machine compressed, C. L.
BOSTON. .... Mass.	67	58	45	34	23	17	17	40	22
NEW YORK.......... N. Y.	60	52	40	30	20	15*	15	35	20
PHILADELPHIA..... Pa.	58	50	38	28	18	13	13	33	18
BALTIMORE.......... Md.	57	49	37	27	17	12*	12	32	17
ERIE and BUFFALO.....	27½	24½	17½	15	10	10	10	10½	10

* Flour, Ship Stuff, Hominy, Groats, Screenings, Hulled Corn, Malt, Bran, Corn Flour, Pearl Wheat, Corn Meal, Buckwheat, Oat Hulls, Malt Sprouts, Middlings, Cracked Wheat, Pearl Barley, Shorts, Ground Corn, Rye Flour, Malt Skimmings, Mill Feed, Grits, Oat Meal, Brewer's Meal, Cracked Corn, Feed, sprouted Barley, Oil Meal, Oil Cake, Sugar Meal, Cotton-seed Meal; Cerealine, in bags or sacks.

The established arbitraries must be added to above Rates to all points which take such established arbitraries.

J. C. EVANS, Agent, Chicago, Ill. D. M. BRIGHAM, Agent, Milwaukee, Wis.
H. C. SHEPARD, Agent, Winona, Minn. C. A. CLAWSON, Agent, Minneapolis, Minn.
S. B. GAULT, Northwestern Agent, St. Paul.

JOHN E. PAYNE, Eastern Manager, Philadelphia.
WM. H. JOYCE, Gen'l Freight Agent P. R. R. Co., Philadelphia.
E. T. EVANS, Western Manager, Buffalo.

Philadelphia, August 11, 1892.

Standard Freight Tariff—Classes.

Distance.	Per 100 pounds. 1	2	3	4	5	6	A	B	C	D	E	Per bbl. F	Per 100 lbs. G	Per 100 lbs. H
Miles.	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*	*Cts.*
5	12	11	10	8	7	6	6	6	4½	3½	7	9	2½	8
10	16	14	13	10	9	8	8	8	5½	5	9	11½	3½	10
15	18	16	15	12	11	9	9	9	6	5½	11	12½	3¾	12
20	20	18	16	14	12	10	10	10	7	6	12	14	5	14
25	22	20	18	16	13	11	11	11	7½	6½	13	15	5½	16
30	24	21	19	17	14	11	11	11	7½	6½	14	15	6	17
35	26	23	21	19	15	12	12	12	8	7½	15	16½	6½	19
40	27	24	22	20	16	12	12	12	8	7½	16	16½	6½	20
45	29	26	24	21	17	13	13	13	8½	8	17	17½	6¾	21
50	**30**	**27**	**25**	**22**	**18**	**13**	**13**	**13**	**8½**	**8**	**18**	**17½**	**7**	**22**
55	32	29	26	23	19	14	14	14	9	8½	19	18	7	23
60	33	30	27	24	19	14	14	14	9	8½	19	18	7½	24
65	35	32	28	25	20	15	15	15	9½	9	20	19	7½	25
70	36	33	29	26	20	15	15	15	9½	9	20	19	7½	26
75	38	35	30	27	21	16	16	16	10	9½	21	20	7½	27
80	39	36	31	28	21	16	16	16	10	9½	21	20	7¾	28
85	41	37	32	29	22	17	17	17	11	10	22	21½	7½	29
90	42	38	33	29	22	17	17	17	11	10	22	21½	8	29
95	44	39	34	30	23	18	18	18	11½	11	23	23	8	30
100	**45**	**40**	**35**	**30**	**23**	**18**	**18**	**18**	**11½**	**11**	**23**	**23**	**8¼**	**30**
110	48	42	37	31	24	19	19	19	12	11	24	23	8½	31
120	51	44	39	32	25	20	20	20	13	12	25	24	8½	32
130	54	46	41	33	26	21	21	21	13	12	26	25	8¾	33
140	57	48	43	34	27	22	22	22	13	13	27	26	9	34
150	**60**	**50**	**45**	**35**	**28**	**23**	**23**	**23**	**14**	**13**	**28**	**28**	**9**	**35**
160	62	52	46	36	29	24	24	24	14	13	29	29	9¼	36
170	64	54	47	37	30	25	25	25	15	14	30	31	9¼	37
180	66	56	48	38	31	26	26	26	15	14	31	31	9½	38
190	68	58	49	39	32	27	27	27	16	15	32	33	9½	39
200	**70**	**60**	**50**	**40**	**32**	**27**	**27**	**27**	**16**	**15½**	**32**	**33**	**9¾**	**40**
210	71	62	51	41	33	28	28	28	17	16	33	34	9¾	41
220	72	64	52	42	33	28	28	28	17	16	33	34	10	42
230	73	66	53	43	34	29	29	29	18	17	34	36	10½	43
240	74	68	54	44	34	29	29	29	18	17	34	36	10½	44
250	**75**	**70**	**55**	**45**	**35**	**30**	**30**	**30**	**19**	**18**	**35**	**38**	**10½**	**45**
260	76	71	56	46	35	30	30	30	19	18	35	38	10½	46
270	77	71	56	46	36	31	31	31	20	19	36	40	10½	46
280	78	72	57	47	36	32	32	32	20	19	36	40	10½	47
290	79	72	57	47	37	32	32	32	21	19	37	42	10½	47
300	**80**	**73**	**58**	**48**	**38**	**33**	**33**	**33**	**21**	**19**	**38**	**42**	**11**	**48**
310	81	73	58	48	38	33	33	33	21	19	38	42	11	48
320	82	74	59	49	39	34	34	34	21	20	39	42	11	49
330	83	74	59	49	39	34	34	34	22	20	39	44	11	49
340	84	74	59	49	39	34	34	34	22	20	39	44	11	49
350	**85**	**75**	**60**	**50**	**40**	**35**	**35**	**35**	**23**	**21**	**40**	**46**	**11**	**50**
360	85	75	60	50	40	35	35	35	23	21	40	46	11½	50
370	85	75	60	50	40	35	35	35	23	21	40	46	11½	50
380	88	76	61	51	41	36	36	36	25	23	41	50	11½	52
390	88	76	61	51	41	36	36	36	25	23	41	50	11½	52
400	**88**	**76**	**61**	**51**	**41**	**36**	**36**	**36**	**25**	**23**	**41**	**50**	**11½**	**52**
410	91	77	62	52	42	37	37	37	26	24	42	52	11½	54
420	91	77	62	52	42	37	37	37	26	24	42	52	11½	54
430	91	77	62	52	42	37	37	37	26	24	43	52	11½	54
440	94	78	63	53	43	38	38	38	27	25	43	54	11½	56
450	**94**	**78**	**63**	**53**	**43**	**38**	**38**	**38**	**27**	**25**	**43**	**54**	**11½**	**56**
460	94	78	63	53	43	38	38	38	27	25	42	54	12	56

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

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EXHIBIT C TO STIPULATION OF COUNSEL.

Standard Freight Tariff—Classes.

	Per 100 pounds.		Per ton.		Per car-load.			Per 100 pounds.
Distance.	J	K	L	M	N	O	P	R
Miles.	*Cts.*	*Cts.*	*$ Cts.*	*$ Cts.*	*$ Cts.*	*$ Cts.*	*$ Cts.*	*Cts.*
5	8	4	35	55	5 00	5 50	4 00	4
10	10	5	50	80	6 50	8 00	5 00	5
15	12	5½	55	85	7 50	9 00	6 00	5½
20	13	6	60	90	8 00	10 00	7 00	6
25	14	6½	65	95	9 00	11 00	8 00	6½
30	15	7	70	1 00	10 00	11 00	8 00	7
35	16	7½	75	1 05	12 00	12 00	9 00	7½
40	17	8	80	1 10	13 00	12 00	9 00	8
45	18	8	85	1 15	14 00	13 00	10 00	8½
50	**19**	**8**	**90**	**1 20**	**14 00**	**13 00**	**10 00**	**9**
55	20	8	95	1 25	14 00	14 00	10 00	9
60	21	9	95	1 30	14 50	14 00	11 00	10
65	22	9	1 00	1 35	15 50	15 00	11 00	10
70	22	9	1 00	1 40	16 00	15 00	11 00	11
75	23	9½	1 05	1 45	16 50	16 00	12 00	11
80	23	9½	1 10	1 50	17 00	16 00	12 00	12
85	24	9½	1 15	1 55	17 50	17 00	13 00	12
90	24	9½	1 15	1 60	18 00	17 00	13 00	13
95	25	10	1 20	1 65	19 00	17 00	14 00	14
100	**25**	**10**	**1 20**	**1 70**	**20 00**	**17 00**	**14 00**	**14**
110	26	10	1 25	1 80	21 00	18 00	14 00	15
120	27	10½	1 30	1 90	23 00	18 00	15 00	16
130	28	10½	1 35	2 00	24 00	19 00	16 00	17
140	29	11	1 40	2 10	25 00	19 00	16 00	18
150	**30**	**11**	**1 50**	**2 20**	**26 00**	**20 00**	**17 00**	**18**
160	31	12	1 60	2 25	27 00	20 00	17 00	19
170	32	12	1 70	2 30	28 00	21 00	18 00	19
180	33	12	1 80	2 35	29 00	21 00	19 00	20
190	34	13	1 90	2 40	29 50	22 00	19 00	20
200	**35**	**13**	**2 00**	**2 45**	**30 00**	**22 00**	**20 00**	**20**
210	36	13	2 10	2 50	31 00	23 00	20 00	21
220	37	14	2 20	2 55	31 50	23 00	21 00	21
230	38	14	2 30	2 65	32 00	23 00	21 00	21
240	39	14	2 40	2 65	33 00	24 00	22 00	22
250	**40**	**15**	**2 50**	**2 75**	**33 50**	**24 00**	**22 00**	**22**
260	41	15	2 60	2 75	34 00	24 00	22 00	22
270	42	15	2 70	2 85	34 50	25 00	23 00	22
280	43	16	2 80	2 85	35 00	25 00	23 00	23
290	44	16	2 90	2 95	36 00	25 00	24 00	23
300	**45**	**16**	**2 95**	**3 00**	**36 50**	**26 00**	**24 00**	**23**
310	46	17	3 05	3 10	37 00	26 00	24 00	23
320	47	17	3 05	3 20	38 00	26 00	24 00	24
330	48	17	3 15	3 30	38 50	27 00	25 00	24
340	49	17	3 15	3 40	39 00	27 00	25 00	24
350	**50**	**17**	**3 28**	**3 50**	**40 00**	**27 00**	**25 00**	**24**
360	51	17	3 28	3 50	40 00	27 00	25 00	24
370	52	17	3 28	3 50	40 00	27 00	25 00	24
380	53	18	3 41	3 60	41 00	29 00	27 00	26
390	54	18	3 41	3 60	42 00	29 00	27 00	26
400	**55**	**18**	**3 41**	**3 60**	**42 00**	**29 00**	**27 00**	**26**
410	56	19	3 54	3 70	44 00	31 00	29 00	28
420	57	19	3 54	3 70	44 00	31 00	29 00	28
430	58	19	3 54	3 70	44 00	31 00	29 00	28
440	59	20	3 67	3 80	46 00	33 00	31 00	30
450	**59**	**20**	**3 67**	**3 80**	**46 00**	**33 00**	**31 00**	**30**
460	60	20	3 67	3 80	46 00	33 00	31 00	30

(Here follows table marked p. 104½.)

105 *Extracts from Annual Report of the South Carolina Railway Company to the Railroad Commissioners of the State of South Carolina for the Year Ending June* 30, 1892.

Extract from page 31.

Gross earnings from operation		$1,509,472 34
Less operating expenses		1,049,535 50
Income from operation		$459,936 84
Deductions from income:		
Interest on funded debt accrued	$374,434 60	
Interest on interest-bearing current liabilities accrued, not otherwise provided for	35,329 53	
Rents	18,750 00	
Taxes	49,902 36	
Permanent improvements	32,499 90	
Other deductions	7,500 00	
Total deductions from income		5,184,163 39
Net income.		
Deficit		$58,479 55

Extract from page 35.

Total passenger revenue	$363,245 10
Mail	28,446 99
Express	23,241 46
Total passenger earnings	414,933 55
Total freight revenue	1,086,015 64
Total passenger and freight earnings	$1,500,949 19
Other earnings from operation:	
Rents, not otherwise provided for	7,300 58
Other sources	1,222 57
Total gross earnings from operation, entire line	$1,509,472 34

Extract from page 61.

Freight traffic:

Number of tons carried of freight earning revenue	794,845
Number of tons carried one mile	74,311,037
Average distance haul of one ton	93.49
Total freight revenue	1,086,015.64
Average amount received for each ton of freight	1.36632
Average receipts per ton per mile	.01461

Estimated cost of carrying one ton one mile	.00738
Total freight earnings	1,086,015.64
Total earnings per mile of road	4,022.28015
Freight earnings per train per mile	2.13061

106 Train mileage:

Miles run by passenger trains	596,919
Miles run by freight trains	509,719
Miles run by mixed trains	.....
Total mileage trains earning revenue	1,106,638
Miles run by switching trains	425,925
Miles run by construction and other trains	119,215
Grand total train mileage	1,651,778
Mileage of loaded freight cars—North or East	3,968,464
Mileage of loaded freight cars—South or West	3,038,127
Mileage of empty freight cars—North or East	1,124,792
Mileage of empty freight cars—South or West	2,142,166
Average number of freight cars in train	28
Average number of loaded cars in train	16
Average number of empty cars in train	12
Average number of tons of freight in train	101.50
Average number of tons of freight in each loaded car	6.40

Hearing had December 11 and 12, 1895.

Trial of Cause.

This cause came up for hearing before the court on the 11th of December, 1895. The pleadings were read to the court and arguments were made by Mr. Northrop, on behalf of complainant, and by Mr. Baxter and Mr. Barnwell, on behalf of defendants, and by Mr. Northrop in reply, on behalf of complainant. The court took the case under advisement and thereafter rendered the following opinion:

Opinion and Decree.

THE UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. In Equity.

H. W. BEHLMER
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD ET AL.

This is a proceeding in equity brought to enforce a finding of the Interstate Commerce Commission, under section 5 of the act to amend an act to regulate commerce, approved March 2nd, 1889 (25 Statutes at Large, 855). This section 5 amends section 16 of the

amended act which was approved 4th February, 1887 (24 Statutes at Large, 379).

The petitioner is a resident of Summerville, an incorporated town on the line of the South Carolina Railway Company, about twenty-two miles from Charleston, South Carolina.

He complained that he had been compelled to pay upon a shipment of two car-loads of hay from Memphis to Summerville, twenty-eight cents per hundred, whilst the through-freight charge from Memphis to Charleston is but nineteen cents per hundred. He charged that this was in violation of section 4 of the act of 1887, the long and short haul clause. The commission heard the case on the petition and answers, decided in favor of the petitioner, and ordered the South Carolina Railway Company, then, and at the date of filing the petition, in the hands of a receiver, to reduce the rate from Memphis to Summerville to 19 cents. The defendant The
107 South Carolina Railway Company, by its receiver, has not obeyed the order.

The facts of the case are, the two car-loads of hay were shipped from Memphis, Tennessee, to Chattanooga, Tennessee; 310 miles over the Memphis and Charleston railroad from Chattanooga to Atlanta, Ga., 152 miles over the East Tennessee, Virginia and Georgia railroad; from Atlanta to Augusta, Georgia, 171 miles over the Georgia railroad; and from Augusta, Georgia, to Summerville, South Carolina, 115 miles. The through-freight charge from Memphis to Charleston is 19 cents. In addition to this, the petitioner paid nine cents. In the through-freight charge of 19 cents, all these railroads participate. None of them but the South Carolina railway had any interest in the nine cents. This is the rate of freight from Charleston to Summerville, approved by the railroad commissioners of South Carolina. All the railroads named are parties defendant. At the date of the transaction complained of, 17th August, 1892, the South Carolina Railway Company was in the hands of D. H. Chamberlain, receiver; the railway property was sold under foreclosure of mortgage in the proceedings in which he was appointed receiver, by D. H. Chamberlain as special master, he having been thereunto named. The sale was confirmed 24th April, 1894, the terms of sale complied with, the deed of conveyance executed shortly thereafter, to wit: 1st May, 1894, and the purchasers were put into possession, and afterward, the South Carolina and Georgia Railroad Company, under purchase from and conveyance by them, was put into absolute possession on 1st July, 1894. The cause was heard before the commission. Its decision was rendered 27th June, 1894. It was served on D. H. Chamberlain, receiver, some time in July, 1894. There is no evidence of any notice to or service on, or refusal or neglect to obey the order on the part of the South Carolina and Georgia Railroad Company, styled in these proceedings, the successor, assignee and purchaser of the South Carolina Railway Company, and its receiver, Daniel H. Chamberlain.

At the threshold of the case, is a motion to dismiss these proceedings against the South Carolina and Georgia Railroad Company, for the want of this evidence above stated. As the testimony taken

in the cause develops, and it is not disputed, the other roads made defendants, had no contract or agreement for through rates from Memphis to Summerville. The rate was to Charleston, a competitive point. Nor did any of the roads other than the South Carolina Railway Company share in the nine cents, over the nineteen cents per cwt. This excess went to the South Carolina railway alone. This preliminary objection therefore is vital.

It is very clear that the South Carolina and Georgia Railroad Company did not become liable in these proceedings against the receiver of the South Carolina railway merely because it was the alienee of the purchaser at the foreclosure sale, or even were it the purchaser itself. (Sullivan *vs.* Portland, &c., R. R. Co., 94 U. S., at page 610. Hoard *vs.* Chesapeake and Ohio R. R. Co., 123 U. S., 222.) If it is so liable, the liability must arise from the terms of sale under which the purchase was made.

108 The petitioner relies upon the terms of the order of sale in the decree of foreclosure of the South Carolina Railway Company which are in these words:

"The purchaser or purchasers at said sale shall as part of the consideration and purchase price of the property purchased, take said property upon the express condition, that he or they or their assigns will pay, satisfy and discharge any unpaid compensation allowed to the receiver and all claims made against said receiver and all obligations contracted and obligations incurred by the receiver, or which may be contracted or incurred by the receiver prior to the delivery of the possession of the property sold to the purchaser or purchasers and which shall not have been paid by the receiver prior to such delivery of possession out of the income of the mortgaged property."

The language of this part of the decree clearly refers to pecuniary obligations. The purchasers are to pay, satisfy and discharge any unpaid compensation, all claims made against the receiver and all obligations of the receiver which shall not have been paid, &c.

The fifth section of the amended act (1889) amended section 16 of the amended act (1887) imposes no punishment, pecuniary or otherwise for disobeying the order of the commission. It does inflict a fine upon the offending party if it disobey the order of the circuit court of the United States, if the commission appeal to such court for assistance, and that court issue its injunction or other process commanding disobedience to the order of the commission to cease. But in such case the punishment is in the nature of a contempt proceeding and the party must be punished for his own act. It cannot be presumed that the South Carolina and Georgia have the same rates as the receiver had when he controlled the property. We cannot presume that this new company, wholly disconnected with the receiver, had adopted all his alienees. *Non constat* that it would disobey the commission if it were served with an order from it. Clearly the refusal of the receiver made nearly two months after the property had been conveyed, and nearly one month after the South Carolina and Georgia Railroad Company were in exclusive possession, in their own right, cannot bind that company.

The petition in this court avers "that the findings and conclusions of the commission in this case, together with a copy of the order and notice were delivered to each and all of the parties to the cause, their receivers and successors in operation."

On this averment it bases its prayer for temporary and permanent injunction against the South Carolina and Georgia Railroad Company, as successors in operation of the receiver. The evidence fails to establish this most material averment. So far as the South Carolina and Georgia railroad is concerned, and as to the South Carolina and Georgia Railroad Company, the prayer of the petition is *coram non judice*. The only ground of jurisdiction against the South Carolina and Georgia Railroad Company is that having been served with a copy of the order of the commission it refused
109 or neglected to obey it. The record discloses no such service, refusal or neglect.

But beside the South Carolina and Georgia Railroad Company there are other defendants. They have answered and have met the issue presented by the petition. The questions made are of deep interest and require solution.

The answer in which all the defendants join, except The South Carolina and Georgia Railroad Company, admits the hearing before the commission and the result, denies as well that it had the effect of a judicial decision, as its correctness in law or fact. It admits that the joint rate agreed upon between the defendants for hay, from Memphis to Charleston, is 19 cents per cwt., but it denies that there is anything more than an arrangement between independent companies, each of which has a specified and distinct interest in this rate. It denies that there is any agreement for a through rate to Summerville, South Carolina, from Memphis. It avers that this rate of 19 cents per cwt. is reasonable. That it is the result not only of competition between the roads charging it, but of competition at Charleston with other all-railroad routes, with rail and water transportation, and with all-water transportation. That the rate on hay to Summerville is made up of this 19 cents per cwt. through charge, which alone is divided between the defendants in definite proportions, and of nine cents per cwt. charged as a local rate on the South Carolina railroad between Charleston and Summerville. That the through rate greatly exceeds what the aggregate of local rates would be, and that the local rate of nine cents has the approval of the railroad commission of South Carolina, and that it is reasonable.

The controlling question in this case is: Have these defendants violated the provisions of the 4th section of the act of Congress approved 4th February, 1887? "An act to regulate commerce, 24 Statutes, 379, section 4: That it shall be unlawful for any common carrier, subject to the provisions of this act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, but this shall not be construed as authorizing any common carrier within the terms of this act to charge

and receive as great compensation for a shorter as for a longer distance.

Provided, however, that upon application to the commission appointed under the provisions of this act, such common carrier may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property. And the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from operation of this section of this act."

The defendants did not avail themselves of this proviso, notwithstanding that the commission opened the door for them to do so. So the question in this case is, Was this charge of 28 cents per hundred from Memphis to Summerville made by these defendants, and was it made under substantially similar circumstances and conditions as the charge of 19 cents per hundred from Memphis to Charleston, the distance from Memphis to Summerville being shorter than the distance from Memphis to Charleston, both Summerville and Charleston being on the same line and in the same direction?

It would appear from the evidence in this case that these defendants had no common controlling head, that they were independent of each other, and that, acting independently, they had so arranged their charges of freight on hay and articles of this character that 19 cents per hundred would be divided between them for transportation between Memphis and Charleston. They had similar contracts from Memphis to Chattanooga, to Atlanta, to Augusta. But these contracts did not include any intermediate points. In the case at bar all that was received by all these connecting roads was 19 cents per hundred. The South Carolina Railway Company shared in this. In addition, that this railway company charged nine cents because the shipment was to Summerville and this nine cents it shared with no one. Strictly speaking, therefore, the defendants did not charge for anything but transportation between Memphis and Charleston. There was no arrangement between them for any other through rate to any point in South Carolina than Charleston, and no authority in any one to change or enlarge the terms of the contract. Certainly the shipping agent in Memphis could not do it. He may very well have said to one who desired to ship hay into South Carolina, and who wished to avoid the local rates on each road, I can do this for you, we have through rates to competitive points. I can give you the benefit of the through rate to Augusta, or I can give you the through rate to Charleston. My authority goes no further. I can put your freight within reach of you on the South Carolina railway, and can bind this road, only as to the rate to Charleston. When you get it there you may contract with the South Carolina Railway Company. The South Carolina Railway Company itself could say to its contracting roads, We are perfectly willing to contract with you for a through rate to Charleston. There we meet competitive carriers and competing markets, and if we do not meet you in lowering the through rates you, and we as well, will lose

business. But we will not agree to through rates to points where we have no competition, and especially to points on our road. Freight to these points and charges for transportation are our own business, and no one else is concerned in it. The mandate of the commission, therefore, to these defendants, other than The South Carolina Railway Company, directs them to do that which it is out of their power to do, and is nugatory and void.

But if we assume, for the sake of argument, that all the defendants are affected by this charge, does it violate the 4th section of the act above quoted?

111 Judge Cooley, *In re* L. & N. R. R. Co., 1 I. C. C. Reports, 57, says: "The charging or receiving greater compensation for the shorter than for the longer haul is sure to be forbidden only where both are under substantially the same circumstances and conditions. And therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its so doing will not alone convict it of illegality, since if the circumstances and conditions of the two hauls are dissimilar the statute is not violated." This is quoted with approbation by the United States circuit court, southern district California, Interstate Commerce Commission *vs.* A. F. & S. F. R. Co., 50 Fed. Rep., 295.

When, then, may the circumstances and conditions of the two hauls be said to be dissimilar? Judge Cooley in the same case answers this question. "Among other things in cases where the circumstances and condition of the traffic were affected by the element of competition and where exceptions might be a necessity if the competition were to continue. And water competition was beyond doubt, especially in view." In the case from 50 Fed. Rep. above cited, this is one of the rubrics: "Los Angeles, California, is a point to which there is active competition in certain kinds of freight between several transcontinental railway lines, direct or by water via Vancouver and San Francisco, also by ocean freights via Aspinwall and the straits of Magellan, from points east of the Missouri river, and a through rate on the same kind of freight, lower than to San Bernardino, an intermediate non-competitive point 60 miles from Los Angeles, on one of the competing railroad lines is not prohibited by the act, since the circumstances and conditions were substantially dissimilar."

The circumstances of the case at bar are closely like those of the case just quoted. Charleston is a competitive point between all-railroad routes, all-railroad routes partly by rail and partly by water, and routes all water. If the defendants had not consented with each other to lower the rate, no hay whatever would come from the hay-producing territory tributary to Memphis; and all the southeast Atlantic States would be compelled to rely on other portions of the West, North or Northeast for hay.

The evidence clearly shows that the rate to Charleston was forced down by this competition. But this is an advantage to all the territory tributary to Charleston, and all stations share in it. No such competition exists at Summerville, a small inland town. If it and others like it were permitted to share in the circumstances and con-

ditions surrounding Charleston and to get the benefit of the competition which Charleston enjoys, and they have not, then *ex necessitate* the South Carolina railway will be called upon to elect between its through business and its local business, and in this election to give up the former. Thus all stations on the line of road will pay local freight on hay and the market to the extent of imports from Memphis will be destroyed. The interstate commerce law was
112 intended to promote trade. Such a construction as is now sought would destroy competition, the life of trade.

The bill is dismissed.

CHARLES H. SIMONTON,
Circuit Judge.

22nd January, 1896.

I, J. E. Hagood, clerk of said court, do hereby certify that the foregoing is a true copy of the original now on file in this court.

Given under my hand and seal of said court, in the city of Charleston, S. C., this the 23rd day of January, A. D. 1896.

J. E. HAGOOD,
[SEAL.] *C. C. C. U. S., Dist. S. C.*

Memorandum.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit. In Equity.

HENRY W. BEHLMER
vs.
THE LOUISVILLE AND NASHVILLE R. R. CO. ET AL.

Memorandum.

Counsel have brought to my attention that in the opinion filed in this case it was stated that there was no evidence that a copy of the order of the Interstate Commerce Commission was delivered to the South Carolina and Georgia Railroad Company.

This was certainly my conviction at the hearing. It appears, however, from statements made since the hearing, that a registered letter was sent from the office of the secretary of the Interstate Commerce Commission some time in July, 1894, and delivered to the South Carolina and Georgia Railroad Company at Charleston. That this letter was received at the Charleston post-office July 9th, 1894, and delivered to one J. H. Williman, who is an agent of the railroad company, receiving letters for it. In this registered letter was a copy of the opinion and order of the Interstate Commerce Commission in this case, in which order are mentioned as defendants The South Carolina Railway Company, Daniel H. Chamberlain, receiver of the South Carolina Railway Company. The South Carolina and Georgia Railroad Company is not mentioned at all. This information has been furnished me since the opinion was rendered, and after the term at which the case was heard. Had

it been supplied to me in proper time it would not have affected my opinion.

CHARLES H. SIMONTON,
Circuit Judge.

17 April, 1896.

Filed April 17, 1896.

113 *Petition for Appeal.*

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit.

HENRY W. BEHLMER, Plaintiff,
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL., Defendants.

Petition for appeal.

To the honorable judges of said court:

Your petitioner Henry W. Behlmer, the complainant in the above-stated cause, respectfully represents that in the final decree of this court rendered in favor of respondents on the 22d day of January, 1896, there is manifest error committed to the injury of this petitioner.

Wherefore your petitioner prays an order granting an appeal from said decree to the United States circuit court of appeals for the fourth circuit.

CLAUDIAN B. NORTHROP,
Attorney for H. W. Behlmer.

Allowed.

CHARLES H. SIMONTON,
Circuit Judge.

Filed 7th April, 1896.

Allowance of Appeal.

UNITED STATES OF AMERICA,
District of South Carolina.

In the Circuit Court, Fourth Circuit.

H. W. BEHLMER, Plaintiff,
vs.
THE LOUISVILLE AND NASHVILLLE RAILROAD COMPANY ET AL., Defendants.

Allowance of appeal.

Now, to wit: on the 7th day of April, 1896, it is ordered that the appeal of the plaintiff in the above-stated case be allowed as prayed

for and that this case be certified to the circuit court of appeals for the fourth circuit, and that citation be issued returnable to said circuit court of appeals, on the 5th day of May, 1896, not exceeding thirty days from this date.

114 Let the appellant also enter, within ten days from this date, into bond, with at least two sureties to be approved by one of the judges of this court, in the sum of $250.00, conditioned to pay all costs that may accrue on said appeal.

CHARLES H. SIMONTON,
Circuit Judge.

7th April, 1896.

Filed 7th April, 1896.

Assignment of Errors.

THE UNITED STATES OF AMERICA, *District of South Carolina.*

In the Circuit Court, Fourth Circuit.

HENRY W. BEHLMER
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL.

Assignment of errors.

In this cause, being an appeal from the decree of the court in above stated case, comes the appellant, Henry W. Behlmer, by his solicitor, and charges and shows that there is manifest error to his injury in the record, and because thereof assigns the following grounds:

1. The court erred in holding that the South Carolina and Georgia Railroad Company is not bound by the order of the Interstate Commerce Commission, as the successor of D. H. Chamberlain, receiver of the South Carolina Railway Company.

2. The court erred in holding that an order of the Interstate Commerce Commission, a department of the Government, made in a proceeding to which the receiver was a party, was not binding upon the purchasers of the mortgaged property, it appearing the said order was served on the receiver prior to his discharge and by the terms of the decree of sale it was expressly made a part of the consideration that the receiver's obligations should be assumed by the purchasers and be binding on them and their successors.

3. The court erred in holding that there is no evidence of any notice to or service on or refusal or neglect to obey the order of the commission on the part of the South Carolina and Georgia Railroad Company, styled in these proceedings the successor assignee and purchaser of the South Carolina Railway Company and its receiver Daniel H. Chamberlain.

4. That the court should have held that the petition for the discharge of the receiver in the case of Bound *vs.* The South Carolina

Railway Company, filed of record in the United States circuit court for the fourth circuit, district of South Carolina, on the 24th day of October, 1894, in which it was stated that all claims which
115 had come into the receiver's hands had been turned over to the purchasers of the road and assumed by them, was sufficient evidence that the South Carolina and Georgia Railroad Company had notice of and was served with the order of the commission, and that the admission in its answer was sufficient proof of its neglect and refusal to obey said order.

5. That the court erred in holding that the terms of the order of sale in the decree of foreclosure of the South Carolina Railway Company refers only to pecuniary obligations, but should have held that the receiver incurred the obligation of obeying all legal orders of the commission resulting from any proceedings to which he was a party, and that by the terms of sale the purchaser and his alienees assumed such obligations which were binding on them.

6. The court erred in not holding that the carriage of freight from Memphis to Summerville on a through bill of lading as one continuous haul in the same cars over the same rails owned by different companies does not constitute an arrangement for transportation subjecting the charge for the entire distance to the terms of the interstate commerce act.

7. The court erred in holding that formal contract for carriage between and from point to point, is necessary between the carriers in order to subject a charge for such entire haul to the operation of the act.

8. The court erred in not holding that as the roads received, forwarded and delivered on a through bill of lading and transported as one through shipment by a continuous carriage, freight from Memphis to Summerville, this constituted an arrangement within the terms of the act, and subjected them to its operation.

9. The court erred in holding that water competition, except between the point of shipment and the point of destination constituted a substantial dissimilarity of circumstances justifying a greater charge for the short haul without first obtaining an order from the Interstate Commerce Commission permitting such charge.

10. The court erred in holding that competition between roads subject to the act for freight moving to and from points where such roads intersect, constitutes a substantial dissimilarity of circumstances justifying a greater charge for the short haul to intervening points where such roads do not intersect, without an order from the Interstate Commerce Commission allowing such charge.

11. The court should have held that the existence of the so-called competing points made by the intersection of railroads at the will of the corporations owning such roads was no justification for a greater charge for the shorter haul.

12. The court erred in not holding that an aggregate charge of 28 cents per hundred for transporting hay and grain in car-load lots from Memphis to Summerville, a distance of 749 miles, is unreasonable in and of itself.

13. That the court erred in holding that competition of market

with market constituted such a dissimilar circumstance and condition as would relieve the carrier from the operations of the fourth section of the act on its own judgment in charging a greater
116 rate for the shorter than the longer haul without first invoking the exercise of the discretion of the commission provided for in said section.

14. That the court erred in holding that the alleged competition between the all-rail lines running into Charleston was real and substantial, but should have held that actually no competition existed, for the reason that all the roads are admitted to belong to an association which fixes their rates.

15. That the court erred in holding that the evidence showed any real or substantial competition by water to Charleston as to hay or grain; but should have held that no actual competition by water exists, and that for years past the amount of hay and grain coming to Charleston by water, or via rail and water, is infinitely small and not of any controlling force or volume.

16. That the court erred in not holding that competition is excluded as a differentiating circumstance and condition in the fourth section of the act to regulate commerce.

17. That the court erred in not holding that as to competition of carrier with carrier, both being subject to the act, the circumstances and conditions are not presumptively dissimilar, and that the carrier, in all such instances, must first invoke the exercise of the discretion vested in the commission before charging a greater rate for the short than for the long haul.

18. That the court erred in not holding that the competition of market with market did not constitute dissimilar circumstances and conditions, and in not holding that in all such instances of competition the carrier should first invoke the discretion vested in the commission before charging a greater rate for the short haul than for the long haul.

19. That the court erred in not entering a decree ordering the defendants to pay to petitioner's counsel a reasonable fee.

20. That the court erred in not finding and granting a decree under the law and evidence in the case, enforcing the order of the Interstate Commerce Commission, as prayed for in the bill, and granting the injunction prayed for, restraining the defendants from violating and disobeying the order of the commission.

CLAUDIAN B. NORTHROP,
Att'y for H. W. Behlmer.

Filed April 7th, with petition for appeal.

117 *Citation.*

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit.

HENRY W. BEHLMER
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD CO. ET AL.

Citation.

The United States of America to the Louisville and Nashville Railroad Company and the Central Railroad and Banking Company of Georgia and H. M. Comer, its receiver, as lessees of the Georgia railroad, the Memphis and Charleston Railroad Company, the East Tennessee, Virginia and Georgia Railway Company, and Samuel Spencer, Henry Fink, and Charles M. McGhee, as receivers of the two last mentioned roads, and the Southern Railway Company, the purchasers, assignees, and successor- of said East Tennessee, Virginia and Georgia Railway Company, and the South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and the South Carolina and Georgia Railroad Company, the purchaser, assignee, and successor of the same, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the fourth circuit, to be holden at Richmond on the 5th day of May, 1896, next, pursuant to an appeal from a decree of the circuit court of the United States for the fourth circuit, district of South Carolina, rendered January 22nd, 1896, in your favor in a cause in said court wherein said Henry W. Behlmer was petitioner, and you were respondents, and to show cause, if any there be, why the decree rendered against the said Henry W. Behlmer, in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 7th day of April, in the year of our Lord one thousand eight hundred and ninety-six.

CHARLES H. SIMONTON,
Circuit Judge.

Filed April 7th, 1896.

Service of a copy of within citation is hereby accepted as due and legal service of said citation.

JOS. W. BARNWELL.

April 10th, 1896.

118 AUGUSTA, GA., *April 10th*, 1896.

I accept service — citation of appeal by H. W. Behlmer *vs.* L. & N. R. R. Co. in U. S. court at Charleston.

JOS. B. CUMMING.

NASHVILLE, TENN., *April 9th*, 1896.

I hereby accept service of citation of appeal by H. W. Behlmer in case of H. W. Behlmer *vs.* L. & N. R. R. Co. in U. S. circuit court at Charleston.

ED. BAXTER,
District Attorney.

WASHINGTON, D. C., *April* 15, 1896.

I acknowledge service of citation in Behlmer case.

W. A. HENDERSON.

Appeal Bond.

Know all men by these presents, that we, Henry W. Behlmer, as principal, and Geo. H. G. Behlmer and Julius D. Koster, as sureties, are held and firmly bound unto the Louisville and Nashville Railroad Company, and the Central Railroad and Banking Company of Georgia, and H. M. Comer and R. Somer Hayes, its receivers as lessees of the Georgia railroad, the Memphis and Charleston Railroad Company, the East Tennessee, Virginia and Georgia Railway Company, and Samuel Spencer, Henry Fink and Charles M. McGhee as receivers of the two last-mentioned roads and the Southern Railway Company, the purchasers, assignees and successors of said East Tennessee, Virginia and Georgia Railway Company and the South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and the South Carolina and Georgia Railroad Company in the full and just sum of two hundred and fifty dollars to be paid to the said above-mentioned obligees, their certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 7th day of April, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas, lately at a term of the United States circuit court for the fourth circuit, district of South Carolina, in a suit depending in said court between Henry W. Behlmer, plaintiff, and the said above-mentioned obligees, defendants, a decree was rendered against the said Henry W. Behlmer, and the said Henry W. Behlmer having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said obligees above named having been issued citing and admonishing them to be and appear at a United States circuit court of appeals for the fourth circuit, to be holden at Richmond on the day in the said citation mentioned.

Now, the condition of the above obligation is such, that if the

said Henry W. Behlmer, shall prosecute said appeal to
119 & 120 effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

H. W. BEHLMER. [SEAL.]
GEO. H. G. BEHLMER. [SEAL.]
JULIUS D. KOSTER. [SEAL.]

Sealed and delivered in the presence of—
GEO. METZ.

Approved by—

CHARLES H. SIMONTON,
Circuit Judge.

Filed April 7th, 1896.

Clerk's Certificate.

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court, Fourth Circuit.

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true and correct copy of the records and proceedings and decree of the court, in the case of Henry W. Behlmer, complainant, *vs.* The Louisville & Nashville R. R. Co. *et al.*, defendants, together with the proceedings had in the cause relating to the same.

Given under my hand and the seal of the said court, at clerk's office, in the city of Charleston, S. C., and district of South Carolina, this 18th day of April, A. D. 1896.

[L. S.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

121 *Supplement to Transcript of Record.*

THE UNITED STATES OF AMERICA, }
District of South Carolina. }

In the Circuit Court. In Equity.

HENRY W. BEHLMER, Plaintiff, Appellant,
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY ET AL., Appellees.

By stipulation of counsel the following extracts from the decree of the circuit court of the United States for the district of South Carolina, in the case of Bound *vs.* The South Carolina Railway Company *et al.*, are printed and filed as a part of the transcript of record in the above case.

CLAUDIAN B. NORTHROP,
Solicitor for H. W. Behlmer.
JOS. W. BARNWELL,
Solicitor for South Carolina and Georgia Railroad Co.

* * * * * * *

The purchaser or purchasers at said sale shall, as part of the consideration and purchase price of the property purchased, take the said property upon the express condition that he, or they, or their assigns, will pay, satisfy and discharge any unpaid compensation allowed to the receiver, and all claims made against the said receiver, and all obligations contracted and obligations incurred by the receiver, or which may be contracted or incurred by the receiver prior to the delivery of possession of the property sold to the purchaser or purchasers, and which shall not have been paid by the receiver prior to such delivery of possession out of the income of the mortgaged property, such claims and obligations so assumed, when duly established, to remain and constitute a fresh lien on the property so sold, in the hands of the purchaser or purchasers until fully paid and discharged: Provided, however, that any claims on account of obligations and liabilities con-
122 tracted or incurred during the receivership, which shall not have been presented to the receiver at the time of the delivery of the possession of the property, shall be presented for allowance within a period of sixty days after the first publication by the receiver of a notice to the holders of such claims to present such claims for allowance. The receiver shall publish such notice at least once a week for a period of four weeks on demand of the purchaser or purchasers, after the delivery of the possession of the mortgaged premises to the purchaser or purchasers at such sale; and any claims for obligations or liabilities contracted or incurred which shall not be presented for allowance within the period of sixty days after the first publication of such notice, shall not be enforceable against the said receiver or the said purchaser or purchasers, or against the mortgaged premises, the possession of which shall have been delivered as aforesaid to the said purchaser or purchasers.

* * * * * * *

The said purchaser or purchasers, or his or their successors or assigns, shall have the right to enter their appearance in this court, and he or they, and any of the parties to this suit, shall have the right to contest any claim or demand pending and undetermined at the date of the confirmation of such sale, or any claim or demand which may be presented at any time thereafter and prior to the expiration of the said sixty days, and shall have the like rights to contest any allowance which may be made after the entry of this decree, and shall have their right to appeal to the United States circuit court of appeals from any decision relating to such claim or claims or allowance according to the law and the practice of said court, and jurisdiction of this cause is retained by this court for the purpose of enforcing the provisions *of* this decree.

* * * * * * *

The receiver herein, on delivering over the property and premises to the purchaser or purchasers, or his or their successors or assigns, or as soon thereafter as practicable, shall also pay over and deliver to said purchaser or purchasers, to be held or treated by him or them as part of the mortgaged premises, all of the net income

arising from the mortgaged premises, as such income may appear on the final settlement of the receiver's accounts.

* * * * * * *

The said special master is hereby required promptly to make a full report of his proceedings touching the execution of the order of sale herein, and such supplemental reports as may be deemed necessary to fully show his action in the premises; and the court has the power to make such further orders in this cause and to give such further direction touching the sale herein ordered, and distribution of the proceeds thereof as may be by it deemed necessary.

* * * * * * *

123 Also the following, from the report of D. H. Chamberlain, special master:

* * * * * * *

The undersigned, special master, appointed to make sale of the property and franchises of the South Carolina Railway Company under the decree of this honorable court, filed November 23d, 1892, and certain decrees supplemental thereto, now has the honor respectfully to report touching his execution of said decrees, as follows:

First. That in accordance with the terms of said decree, and certain decrees supplemental thereto, he advertised the property and franchises of the said South Carolina Railway Company to be sold on the 12th day of April, A. D. 1894, at 11 o'clock a. m., at the principal offices of the said company, corner of King and Ann Sts., in the city of Charleston, for six successive weeks prior to the said 12th day of April, A. D. 1894, in the *News and Courier*, a newspaper published in the city of Charleston, S. C., also in the New York *Evening Post*, a newspaper published in the city of New York, N. Y.; also in the *State*, a newspaper published in the city of Columbia, S. C., and in the *Waterce Messenger*, a newspaper published in the city of Camden, S. C.; said advertisement stating the time and place of the sale, and containing a brief description of the property to be sold, and referring to said decrees for further particulars; that he files herewith a copy of each of said advertisements in each of said newspapers, respectively, as Exhibit "A" to this report.

Second. That in accordance with the requirement of said decree (folios 51 and 52) he duly filed with the clerk of this court his bond, with surety, approved by this court, in the penal sum of one hundred thousand ($100,000) dollars, with the condition for the faithful performance of the duties imposed on him in such decree as such special master.

Third. That on the 12th day of April, A. D. 1894, at the time and place designated in said decrees and advertisement, he offered for sale, under the terms of said decrees the property and franchises of the said South Carolina Railway Company, as set forth in said decrees and advertisements, and thereupon, through H. H. De Leon, Esquire, as auctioneer, the property was cried for sale, and bids called for and received;

That in accordance with the terms of said advertisement, Wheeler H. Peckham, Esquire, of New York city, presented to the special master a duly certified check upon the Union National Bank of New York City for one hundred thousand ($100,000) dollars, payable to said Wheeler H. Peckham, and by him endorsed to the order of the special master, which check was accepted by the special master, and thereupon the said Wheeler H. Peckham offered a bid of one million ($1,000,000) dollars for the said property and franchises;

That no other bid being offered, the property was struck off and declared sold to said Wheeler H. Peckham for the sum of one million ($1,000,000) dollars.

124 That thereupon the said Wheeler H. Peckham announced to the special master that he had made the bid and purchased the said property and franchises as attorney for Henry W. Smith, Gustave Kissel and Peter Geddes, their survivor or survivors.

April 13th, 1894.

* * * * * * *

Also the following extracts from petition of D. H. Chamberlain for discharge as receiver, filed 4th October, 1894:

"That on the 12th day of May, 1894, your petitioner turned over and delivered to the purchaser—the South Carolina and Georgia Railroad Company—all said property and assets which had been in his hands. * * *

"That all the claims against the receiver, and all obligations incurred by him, were duly turned over by your petitioner to said purchaser for payment on said 12th day of May, 1894; and that your petitioner has heretofore remained in his office of receiver for the purpose of adjusting and securing due payment and adjustment of all the claims and obligations of said receiver; and your petitioner now reports that each and all of said valid claims and obligations have been paid or assumed by the said purchaser and are in due process of settlement and payment, and that merely a nominal amount of such claims and obligations now remain unpaid, all of which claims and obligations are delayed by causes that will speedily be removed."

Also the following extract from the order of discharge, filed November 6, 1894:

* * * * * * *

"*Ordered*, That the prayer of the petition be granted, and that the said D. H. Chamberlain be discharged finally from all duties, liabilities or responsibilities as receiver, in this cause, except so far forth as respects the use of his name in all pending suits in which said receiver is plaintiff or complainant, which said suits shall be continued by the said receiver for the use of the persons interested therein upon his proper costs being assured to him."

125 On the same day, to wit, April 20, 1896, the appearance of Claudian B. Northrop, Esquire, is entered for the appellant, and the appearance of Ed. Baxter, W. A. Henderson, J. W. Barnwell, and Joseph B. Cummings, Esquires, *are* entered for the appellees.

At the May term, 1896, of the said circuit court of appeals, to wit, on May 28, 1896, the said cause came on to be heard on the transcript of the record, and was argued by counsel and submitted.

At the November term, 1897, of the said circuit court of appeals, to wit, November 3, 1897, the court here announced and filed its opinion, which is as follows, to wit:

126 *Opinion.*

Filed Nov. 3, 1897.

United States Circuit Court of Appeals, Fourth Circuit.

HENRY W. BEHLMER, Appellant, *vs.* THE LOUISVILLE & NASHVILLE RAILroad Company *et al.*, Appellees.	No. 173. Appeal from the Circuit Court of the United States for the District of South Carolina.

(Argued May 28, 1896; decided November 3, 1897.)

Heard by Goff, circuit judge, and Hughes and Morris, district judges.

C. B. Northrop, counsel for appellant; Ed. Baxter, W. A. Henderson, J. W. Barnwell, J. B. Cumming, J. E. Burke, counsel for appellees.

GOFF, *Circuit Judge:*

On the 27th day of June, 1894, the Interstate Commerce Commission entered an order requiring the appellees to cease and desist on or before the 15th day of July, 1894, and thenceforth abstain from charging, demanding, collecting or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by and under the circumstances and conditions similar to those appearing in this case from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than
that contemporaneously charged and received for the trans-
127 portation of hay and such other commodities for the longer distance from Memphis aforesaid, to Charleston, in the State of South Carolina. Such order was entered as the result of the hearing of the petition that had been theretofore filed before such commission, by the appellant, Henry W. Behlmer. In his complaint so filed he alleged in behalf of himself and other merchants and residents of Summerville, that the defendants were charging an unreasonable and excessive rate of 28 cents per 100 pounds on hay in car-load lots, from Memphis to Summerville; that Summerville is an incorporated town of considerable size and importance, situated on the South Carolina railway, in the State of South Carolina, and twenty-two miles inland from the city of Charleston; and that said rate of 28 cents per 100 pounds is 9 cents per 100 pounds greater than the defendants charge and receive for transporting hay in car-loads from Memphis through Summerville to Charleston,

and that such greater charge constituted a violation of the long and short haul clause of the interstate commerce act; that said rate of 28 cents to Summerville was equal to the rate of 19 cents in force on hay in car-loads from Memphis through Summerville to Charleston, with the local rate of 9 cents per 100 pounds charged over the South Carolina railway, for carrying hay from Charleston back to Summerville; and that the 9-cent local rate which the complainant was forced to pay, in addition to the through Charleston rate, in order to get hay transported from Memphis to Summerville, was unreasonable and excessive; that the petitioner carried on a wholesale hay and grain business in said town of Summerville, and was thus 22 miles nearer than Charleston to the western points where grain shipments originated; that the petitioner received at Summerville two car-loads of hay ordered by him and shipped to him from Memphis, Tennessee, which hay was so transported to him from Memphis to Chattanooga, 310 miles, by and over the lines of the Memphis & Charleston R. R., thence to Atlanta, Georgia, 152 miles, by the lines of the East Tennessee, Virginia & Georgia R. R., thence to Augusta, Georgia, 171 miles, over the lines of the Georgia R. R, thence to Summerville, 115 miles, over the lines of the South Carolina Railway Co.; that the defendants were common carriers under a common control and management, for continuous carriage or shipment, and were
128 engaged in the transportation of passengers and property wholly by railroad, between the points mentioned. Also that the two car-loads of hay referred to were hauled from Memphis to Summerville over the same line, in the same direction as Charleston, and under substantially similar circumstances and conditions as was the Charleston traffic; that the haul from Memphis to Summerville was twenty-two miles shorter than the haul from Memphis to Charleston, and that such shorter distance was included in the longer distance; that the petitioner was forced to pay 28 cents per 100 pounds on said shipment to Summerville, the shorter distance, when the rate to Charleston, the longer distance, was 19 cents per 100 pounds; that the petitioner was thereby obliged to pay $56.00 in the aggregate as freight on the two car-loads of hay from Memphis to Summerville, when the same shipment would have been made by the same roads, over the same rails, in the same direction, to Charleston, a greater distance of twenty-two miles, for a less sum, to wit: $38.00 in the aggregate. The petitioner further alleged that the local rate of 9 cents per 100 pounds for twenty-two miles, as also the aggregate charge of 28 cents per 100 pounds, from Memphis to Summerville, was excessive and unreasonable, and, therefore, in violation of the act to regulate commerce. It was further alleged by the petitioner that all of the railway lines mentioned in the petition and made defendants in said proceedings were members of the Southern Railway & Steamship Association, and that the discrimination and excessive rates against Summerville existed not only on hay, but on all other articles of interstate commerce coming to that place, greatly to the detriment and disadvantage of that town, and to the business of its merchants. The petitioner

prayed that the notice required in such cases issue to said railroad, and that the Interstate Commerce Commission would order that the defendants cease from violations of the law in the particulars mentioned, and for such other and further relief as the commission might think proper.

The notice issued and the defendants duly appeared and filed their answers. The joint answer of the receivers of the East Tennessee, Virginia & Georgia Railway Co. and of the Memphis & Charleston R. R. Co. admits that such companies are subject to the act to regulate commerce, and in effect that the shipment of hay took
129 place as set forth in the petition, but it was not admitted therein that the rates specified constituted a violation of the law, and proof of the same was demanded. The answer of the lessees of the Georgia R. R., as also the answer of the receivers of the South Carolina Railway Co., are in substance the same. Concerning the petitioner's allegations of a violation of the fourth section of the interstate commerce act, the answers make the following averments, in substance: That the Georgia R. R. Co., and the other carriers complained against have no joint through tariff from Memphis to Summerville, and that, therefore, they have no "line" in the sense of said section, from Memphis to Summerville, on which that section can operate; that the transportation of the two car-loads of hay from Memphis to Summerville was not done under substantially similar circumstances and conditions as the transportation of like property from Memphis to Charleston, for the reason that Summerville is a local station on the South Carolina railway, not on any water route, and that enterprise and capital has not constructed more than one railroad to it; that consequently it has not the advantage of competition of carriers, as the said railroad on which it is located is not compelled by competition to choose between a reasonable rate and a rate which is much below what is reasonable; and at Charleston there exists competition with numerous other all-rail routes between Memphis and that city, eight of which are mentioned by name, and the lines composing the same set forth in detail. The claim was made by the defendants in their answers that all such lines were actual competitors for business from Memphis to Charleston; that Charleston was a port on the Atlantic coast, easy of access for vessels from Baltimore, Philadelphia, New York, Boston and other eastern ports from which hay is shipped by water; that if the railroads running from Memphis to Charleston charged rates to all places as high as the rate to Summerville, although the latter rate is in itself reasonable, no hay would be shipped from Memphis to Charleston, but the latter city would be supplied with hay from the North Atlantic ports, and said railroads would not only be deprived of such business, but that Memphis would loose the hay market; that the rates on western produce to Charleston and other
130 coast cities are made with a view to actual existing water competition; that western produce such as grain and hay can be shipped from Chicago to Charleston, through the ports of New York, Philadelphia or Baltimore, over continuous water routes

by the lakes and canal, or over combined rail and water routes; that the all-rail lines seeking to do business between Chicago, Charleston and the coast cities, are compelled to make their rates approximate those offered by the continuous water route or the combined rail and water routes; that the all-rail routes make their rates as much higher as the difference in services will permit, and those rates are correspondingly adjusted from all western points such as Evansville, Cairo, St. Louis and Memphis, the present all-rail rates on hay per 100 pounds being as follows: From Chicago, 33 cents; from St. Louis, 28 cents; from Louisville, Evansville and Cairo, 23 cents; from Memphis, 19 cents. The defendants claimed, therefore, that the rate from Memphis to Charleston on hay was forced upon their lines by actual existing water competition as well as by other additional competition beyond their control; that the controlling element in said competition is the lake, canal and ocean transportation between Chicago and Charleston, or the lake transportation from Chicago to Buffalo or other lake ports, thence by rail to New York, and thence by ocean to Charleston, or rail transportation from Chicago to Baltimore, Philadelphia or New York, and thence by ocean to Charleston.

The case being at issue upon the complaint and answers—the testimony having been duly taken—the same was, after argument by counsel, duly submitted to the commission, which directed the order to the appellees hereinbefore referred to, and, as required by law, it caused a properly authenticated copy of its report and of its findings of fact and conclusions thereon, together with a copy of said order, to be delivered to each and all of the parties to said cause, their receivers and successors in operation.

The defendants to said proceeding before the Interstate Commerce Commission having failed and refused to obey such order, the said Henry W. Behlmer filed his petition, as he was authorized by the interstate commerce law to do, in the circuit court of the United States for the district of South Carolina, in which the action
131 had before the commission was fully set out, and the refusal of the defendants therein to comply with what he charged to be the lawful order of the commission was alleged, and the prayer was made that an order be entered granting to the petitioner a writ of injunction restraining the defendants, their officers, servants and attorneys from continuing in their violation and disobedience to said order of the Interstate Commerce Commission; and that finally, an order and decree be issued restraining the said defendants, and each of them, and their officers, servants and attorneys, from further violating or disobeying the requirements of said order of the commission, and decreeing permanent obedience to the same, together with such further and additional orders as are usually entered under such circumstances.

The court below, on the 2nd day of November, 1894, directed that the defendants appear and answer said petition, and show cause, if any they could, why the prayer of the same should not be granted. In the same order, it was provided that the defendants be restrained and enjoined, until the further order of the court,

from charging, collecting or receiving any greater compensation in the aggregate for the transportation of hay, or other commodities, carried by them under circumstances and conditions similar to those in this case, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and such other commodities, respectively, for the longer distance from Memphis to Charleston, and also the South Carolina & Georgia R. R. Co. was restrained and enjoined from imposing, charging and collecting the added local of 9 cents in addition to the through rate of 19 cents to Charleston.

The case was duly matured and came on to be finally heard on the 11th day of December, 1895, when after argument the court took the same under advisement, and afterwards, on the 22nd day of January, 1896, entered a decree dismissing the bill. From this decree the petitioner appealed.

At the time of the institution of the proceedings before the Interstate Commerce Commission the South Carolina Railway Co. was represented by Daniel H. Chamberlain, its receiver, who was made a defendant, and who filed his answer to the petition. The
132 proceedings were instituted in December, 1892, and the order of the commission issued on the 27th day of June, 1894, but prior thereto, on April 12, 1894, the South Carolina Railway Co. was sold by virtue of a decree of the circuit court of the United States for the district of South Carolina, entered in the cause of *Bound vs. South Carolina Railway Co. et al.*, in which said cause the said Daniel H. Chamberlain had been appointed such receiver. On the 12th day of May, 1894, the purchaser of said property under said foreclosure sale conveyed the same to The South Carolina & Georgia R. R. Co., a defendant herein. That company moved the court below to dismiss these proceedings, so far as it was concerned, for the reason that there was no evidence before the court of any notice to, or service of the same upon said company, of the institution of this action before the Interstate Commerce Commission, nor any evidence of any refusal or neglect by it to obey the order of the commission. The court below was of opinion that there was no evidence of the service of the commission's order on the South Carolina & Georgia Railway Co., nor of its refusal or neglect to obey the same, but as there were other defendants as to whom it was necessary to dispose of the questions raised, the court proceeded to a decree concerning the same.

The petition filed in the court below avers that the findings and conclusions of the commission in the matter of the petition filed before it by the appellant, together with a copy of the order and notice, were delivered to each and all of the parties to the cause, their receivers and successors in operation. We think the evidence sufficiently sustains these allegations. The South Carolina Railway Co. had due notice of the proceedings before the commission, and filed its answer through its receiver, and it plainly appears that a registered letter was sent from the office of the secretary of the commission in July, 1894, and duly delivered at Charleston to the suc-

cessor of said South Carolina Railway Co.—the South Carolina & Georgia R. R. Co.—which contained a copy of the opinion and order of the Interstate Commerce Commission made and filed in the matter of said petition. That such copy was received by the South Carolina & Georgia R. R. Co. is not doubted, and the point
133 relied upon by that company in its motion to dismiss made in the court below was that the name of the South Carolina & Georgia R. R. Co. is not mentioned in said order and opinion, and the further fact that said company was organized after the date when such order and opinion were made and filed. In our judgment this position of the South Carolina & Georgia R. R. Co. is without merit. So far as the questions involved in this controversy are concerned, we think it had sufficient notice, and in fact that it was bound by the notice served upon and the answer filed by the receiver of the South Carolina Railway Co. The petitioner in his complaint filed with the commission charged the South Carolina Railway Co. and its receiver with unlawfully charging an unreasonable rate of freight on certain articles transported over its line and other lines with which it had traffic arrangements, and the commission, after full investigation, found that the petitioner's allegation was true, and ordered that said road and the others connected with it cease, on or before July 15, 1894, to make such unlawful charges. We are utterly unable to agree with the contention that such order of the commission was rendered absolutely nugatory, within a few days after it was issued, by the mere fact that the name of one of the railroads mentioned therein had in the meantime been changed, while the traffic arrangements theretofore in existence were still in force. To so hold would render it impossible for any petitioner to obtain relief in cases similar to this, and would in fact prevent the commission from enforcing its lawful orders. The Supreme Court of the United States in the case of *United States vs. Trans-Missouri Freight Association*, 166 U. S., 290, 309, in effect decides this point in the manner we have indicated when it says in substance that if by the mere dissolution of the association originally proceeded against the suit abates, that then defendants have thereby discovered an effectual means to prevent the judgment of the court being given on the question really involved in the case.

We do not think it essential to the decision of this case to further consider the argument of counsel relating to the pecuniary liability of the purchaser or property sold under foreclosure decree, nor of the responsibility of such purchaser for contracts made by the receiver prior to such sale, as, in our judgment, the propositions of law therein involved are not applicable to the facts
134 and circumstances of this case. We conclude that the court below had jurisdiction of the parties and of the subject-matter involved, and such being the case, it was its duty as a court of equity to make both its jurisdiction and its remedy effectual for perfect relief, if it found the allegations of the petition to be true.

This brings us to the real question in this case, and that is, Have these defendants violated the provisions of the fourth section of the

act of Congress, approved February 4, 1887, entitled "An act to regulate commerce"? (24 Statutes at Large, 379.) That section reads as follows:

"SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance; provided, however, that upon application to the commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distance for the transportation of passengers or property; and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

We find this case, so far as the fourth section is involved, to be quite similar to the case of *Cin., N. O. & Tex. Pac. Railway v. Int. Com. Com.*, 162 U. S., 184, commonly known as "*The Social Circle case.*"

That the appellees, in transporting the hay and other property mentioned in the petition filed in this cause, and in establishing the rates on the same from Memphis to Charleston, and from Memphis to Summerville, were engaged in such transportation under a common management for continuous carriage or shipment, within the meaning of that language as used in the act to regulate commerce, is, we think, without doubt, and therefore it follows that it
135 was within the jurisdiction of the Interstate Commerce Commission to ascertain whether, in charging a higher rate for a shorter than for a longer distance over the same line in the same direction—the shorter being included within the longer distance—the appellees were transporting such property under substantially similar circumstances and conditions. The appellees alleged, both before the commission and the court below, such substantial dissimilarity of circumstances and conditions as justified them in making the greater charge for the shorter haul complained of in the petition, and upon them was the burden of showing affirmatively that such circumstances and conditions were in fact substantially dissimilar. The commission, in ascertaining the facts, found against this claim of the railroad companies and entered the order, the enforcement of which was the object of the petition filed by the appellant. The circuit court, however, on hearing the matters involved, sustained the claim of the appellees and refused to enforce the order of the commission.

The appellees claim that the substantial dissimilarity in the circumstances and conditions under which they transport property from Memphis to Charleston, and from Memphis to Summerville,

is created by: 1. The competition of various markets for the trade of Charleston, such as New York, Boston, Philadelphia, Baltimore, Chicago, and other points which can reach Charleston by all-water lines, or by all-rail lines, or part rail and part water routes. 2. The competition of all-rail lines between Memphis and Charleston.

The decisions of the Interstate Commerce Commission, concerning the proper construction of this fourth section of the commerce act, have not been uniformly sustained by the decrees of the courts of the United States in cases instituted for the purpose of enforcing the orders of the commission concerning that section, and, therefore, prior to the announcement of the opinion of the Supreme Court in the *Social Circle case* there was much confusion concerning the true meaning of the same. A careful reading of that opinion impels us to the conclusion that the construction given that section by the Interstate Commerce Commission, in a number of cases decided by it prior to such decision, is the proper one. In this connection may be cited the following: *The James & Mayer Buggy Co. v. The Cin., N. O. & Tex. Pac. R. Co. et al.*, 3
136 Inters. Com. Rep., 682; *Ga. R. R. Co. v. Clyde S. S. Co.*, 4 Inters. Com. Rep., 120; *Chattanooga Board of Trade v. East Tenn., V. & G. R. Co.*, 4 Inters. Com. Rep., 213. Such being our conclusions, we have now to determine whether or not the facts found by the commission are supported by the evidence taken in this case, or, in other words, whether or not the circumstances and conditions attending the transportation of hay from Memphis to Charleston, and from Memphis to Summerville, are so dissimilar as to justify the rates charged, respectively. Does the competition set up by the appellees as existing by water between Chicago and the North Atlantic ports, and the competition by rail between Memphis and Charleston, as also the competition of market with market, constitute substantial dissimilar circumstances and conditions within the meaning of the said fourth section of the act to regulate commerce? Did such competition in fact affect rates between Chicago, the North Atlantic ports and Charleston? We are of the opinion that it was not of controlling force; that it was not such effectual competition as would constitute the dissimilar circumstances and conditions which would justify the commission, upon application to it, in authorizing the carrier to charge less for the longer than for the shorter haul. We adopt the conclusion heretofore announced by the Interstate Commerce Commission, which is, in substance, that in order to justify the greater charge for the shorter distance because of water competition, the transportation as to which such competition exists must be concerning freight to the longer distance point, which, if not carried to such point by the road giving the rate complained of, could reach that point by water transportation; and also that the competition of one transportation line cannot be said to meet that of another for the carriage of traffic from any particular locality, unless one line could perform the service if the other did not. Such we believe to be the true meaning of said fourth section, so far as the point we are now considering is involved. We are also of opinion that the competition claimed by

the appellees to exist between the different markets—particularly those of Memphis, Chicago, and the North Atlantic ports—to supply the trade of Charleston in the products mentioned, is not in reality the competition that affects rates from a particular
137 locality, but is one that is regulated by the commercial circumstances existing at those points, applicable to business of that character and not connected with the usual conditions under which transportation is conducted, nor does such competition in our judgment create the dissimilar circumstances and conditions referred to in the fourth section of the act now under consideration. And we further hold that competition between carriers subject to the requirements of said act does not produce such substantial dissimilarity in the circumstances and conditions under which transportation is performed as will justify such carriers in making a greater charge for the shorter than for the longer haul, without an order to that effect from the commission, granted by it as provided for in the proviso to the fourth section.

It is fair to presume that if the facts in any given case justify departure from this rule, the commission will, on a proper showing, grant the relief asked for, and make such exceptions as the circumstances suggest as proper, and justice to the carrier as well as the shipper, demands. If the carriers were permitted to determine such questions, the conflicting results produced by opposing interests would not only cause confusion, but work great injury in many cases to the shippers, to localities, and also to certain lines of business that would be affected thereby. If the competition of markets, or of carrying lines, subject to the provisions of the commerce act, justify carriers in making greater short-haul and lower long-haul charges, over the same line, without an order from the commission, issued after due investigation, then the unjust rates for transportation existing when that law was enacted, and which it was intended should be prohibited by it, will continue to be imposed and collected, and schedules shall be made, announced and maintained, to the prejudice of some localities and in favor of others, to the destruction of some shippers and to the profit of others. This statute was intended to prevent any and all kinds of discrimination in favor of localities, individuals or corporations, and to put all shippers on the same footing—that of perfect equality.

The rate from Memphis to Charleston on hay and grain, and like products, is reasonable, and is shown by the evidence to be remunerative; it is fair to presume that it would not have been made by the railroads, unless those controlling them were satisfied
138 that it would be so, and, consequently, to justify the higher charge for the shorter haul to Summerville, which, we have found was made under substantially similar circumstances and conditions, the commission, after application to it for that purpose, must find certain reasons for the same, after due investigation, that may in fact exist, but which, we are compelled to say, are not now disclosed by the record before us. In the light of the act to regulate commerce, and keeping in view the theory upon which it was constructed, it is not difficult to understand why application was

not made to the commission for permission to charge less for the longer haul to Charleston than for the shorter haul to Summerville, when the rate proposed was 19 cents per 100 pounds for the longer and 28 cents per 100 pounds for the shorter.

The appellees contend that the smaller charge for the greater distance is, in this case, of great importance to the city of Charleston, as well as to the section of country adjacent thereto, as by means thereof the merchants of that city are enabled to build up a trade that otherwise would be lost to them. That may be true, but is not the same argument applicable to Summerville and other interior cities along the lines of the roads operated by the appellees between Charleston and Memphis? In order to build up one locality, we should not tear down many others; and justice to one section should not be purchased at the expense of another.

It should be kept in mind that the petitioner does not ask that the rate from Memphis to Charleston be changed—that it shall be made less and, consequently, unremunerative, or increased, and thereby cause the loss of the traffic—but only that the rate from Memphis to Summerville shall not be greater than the rate to Charleston.

Finding the facts to be as above indicated—substantially as found by the Interstate Commerce Commission in the proceedings instituted before it by the appellant—and construing the law as we do, it follows that the order issued by said commission to the appellees was a lawful order, of which they had due notice, and which it was and is their duty to obey and respect.

We do not find it necessary to consider and dispose of the questions raised in the pleadings and argued by counsel, concerning
139 the Southern Railway and Steamship Association, nor the matter of the added local charge of 9 cents from Charleston to Summerville, otherwise than it may be involved in the through rate to Summerville.

The decree of the court below dismissing the bill is reversed, and this cause is remanded to said court with instructions to enter a decree herein, requiring the appellees and each of them to desist from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities, respectively, for the longer distance from Memphis aforesaid, to Charleston, in the State of South Carolina. Said court will also see that the requirements of said decree are immediately carried into effect, and enforced, as provided for in said act to regulate commerce, and will further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may, under the circumstances of this case, think proper and just.

Reversed and remanded.

MORRIS, *District Judge:*

I am unable to join in the order reversing the decree of the circuit court, which it is proposed to pass in this case, and will very briefly state my reasons:

Behlmer, in his petition to the commission, complained that he was charged as freight on two car-loads of hay from Memphis to Summerville at the rate of twenty-eight cents per hundred, while the rate over the same roads to Charleston, twenty-two miles farther, was only nineteen cents. This, he alleged, was a violation of the fourth section of the interstate commerce act. He further complained that the nine cents additional per hundred charged to Summerville was based on the local rate for twenty-two miles from Charleston back to Summerville over the South Carolina railroad, which itself, he alleged, was excessive and unreasonable, and he further alleged that the combined rate of twenty-eight cents
140 from Memphis to Charleston was excessive and unreasonable and in violation of the first section of the act.

The defendants answered, alleging that there were eight all-rail routes which were competitors for the business from Memphis to Charleston; that there was besides existing water competition from ports on the Atlantic coast to Charleston; and that the rate from Memphis to Charleston of nineteen cents per hundred was forced upon the defendant lines by this rail and water competition which they had to meet at Charleston, but which the South Carolina railroad did not have to meet at Summerville, and that rates which were just and reasonable to Summerville would result in the loss of the business if charged to Charleston.

The commission considered only the allegation that the defendants violated the long and short haul clause, and in view of their decision on that point deemed it unnecessary to consider whether any other provision of the law had been violated.

In the decision of the commission appears the following:

"There is no showing in this proceeding of competition by lines not subject to the act to regulate commerce for the carriage of hay from Memphis to Charleston, and the fact that there may be competition for such traffic by lines which are subject to the act, or that hay may be carried to Charleston by various rail and water or part rail and part water routes from points other than Memphis, does not justify the defendant carriers in departing from the general rule of the fourth section upon their own motion. Such considerations may constitute reasons for applying to the commission for relief under the proviso clause of that section, but for the reasons stated in our decisions of the cases above cited they do not justify carriers in departing from the rule of the fourth section without such relieving order. Water competition to justify lower long-haul rates must exist between the point of shipment and the longer-distance destination. One transportation cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could and would perform the service alone, if the former did not undertake it. The compe-

tition of markets or the competition of carrying lines subject
141 to regulation under the act to regulate commerce does not justify carriers in making greater short-haul or lower long-haul charges over the same line, without an order issued by the commission on application therefor after investigation."

The decision then quotes the rule of practice of the commission with reference to applications under the proviso of the fourth section, and then proceeds:

"Because Charleston is an important seaport and railroad centre, and hay may be and is carried there from various points, is not a sufficient reason for a departure from this rule. The just interests of the carrier are fully protected by the proviso clause of the fourth section. The defendants are under no obligation to compete at low rates for the carriage of hay from Memphis to Charleston. They ought not to engage in such competition, if the rates obtainable are not remunerative. If they are remunerative, the defendants cannot, in the face of the prohibition of the 4th section, and the provision in that section for the issuance of relieving orders, assume to say that such rates, though profitable on Charleston traffic, are insufficient for the transportation of car-load quantities to a shorter point on the same line and in the same direction."

There was no finding of fact by the commission other than is contained in the foregoing extract from its decision, and it is obvious that the commission did not pass upon the question of the dissimilarity of the circumstances and conditions, nor upon the question whether the rate for the shorter haul was of itself reasonable and just. They took the law to be that by charging a greater rate for the shorter haul over the same line, the carriers were *prima facie* without justification, and that they could only be permitted lawfully to make the charge after they had been authorized upon application to the commission under the proviso of the 4th section. One of the cases cited by the commission in support of this proposition of law is the decision of the circuit court of appeals in *Int. Com. Com. vs. Cin., N. O. & Tex. Pac. R'y*, now known as the "*Social Circle case.*"

The Supreme Court, in reviewing that case (162 U. S., 184–194), did not approve such a hard and fast rule, but held in that case that as the commission had found as a fact that the circumstances
142 and conditions were not so dissimilar as to justify the rates charged, and as the circuit court of appeals had approved that finding, the Supreme Court would not disturb it. But in the case known as the "*Import case,*" 162 U. S., 197, the Supreme Court held, in deciding a similar question, that it was error for the commission not to consider an existing competition which affected rates, and the fact that rates had to be reduced in order to secure freight, which otherwise would go by other routes, was one of the circumstances and conditions which must be considered before substantial similarity could be determined.

It may be fairly said, therefore, that the commission failed to consider one of the circumstances without which it could not arrive at a just finding. *Tex. Pac. R'way v. Int. Com. Com.*, 162 U. S., 197–

238; *Int. Com. Com. v. The Alabama Midland R'w'y Co.*, ct. ct. of apps., 5th circuit; *Int. Com. Com. v. L. N. R. R. Co.*, 73 Fed. Rep., 409.

It was error, I think, for the commission to hold that the carriers could not justify themselves, because they had not first made application for relief under the proviso of the 4th section. It has been held that if the carrier can show that the circumstances and conditions of the two hauls are dissimilar, the statute has not been violated (*Int. Com. Com. v. A., T. & S. F. R. R. Co.*, 50 Fed. Rep., 295), and this seems a reasonable construction of the law.

The case, therefore, it appears to me, came into the circuit court without any finding of fact upon which an order against the carriers could be predicated. The circuit judge examined the testimony and considered the evidence tending to prove that the through rate had been forced down by the natural advantages of Charleston as a trade centre, having numerous routes by rail, by rail and water, and by water over which merchandise of the kind in question was brought to that city, and to compete with which the defendant carriers were obliged to reduce their railroad rates on through freight to Charleston. Summerville had no similar natural or artificial advantages, and its only carrier, the South Carolina and Georgia railroad, was not subject to having its local rates forced down by competition below what was reasonable and just.

143 Upon consideration of all the proven facts, the circuit judge found that the circumstances and conditions were not substantially similar, and that the defendant carriers had not violated the act.

With this conclusion I agree. There is abundant proof to support it and also to show the great loss which would result to the South Carolina & Georgia railroad (the successor of the South Carolina railroad), if it was required to conform its local rates to its share of the through rates.

144 Afterwards, at the same term, to wit, on November 6, 1897, the court here made and entered the following decree, to wit:

Decree.

United States Circuit Court of Appeals, Fourth Circuit.

HENRY W. BEHLMER, Appellant,
vs.
LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE Central Railroad and Banking Company of Georgia, and H. M. Comer, its Receiver, as Lessees of the Georgia Railroad; The Memphis and Charleston Railroad Company, The East Tennessee, Virginia and Georgia Railway Company, and Samuel Spencer, Henry Fink, and Charles M. McGhee, as Receivers of said Last Two Mentioned Roads, and The Southern Railway Company, the Purchaser, Assignee, and Successor of said East Tennessee, Virginia and Georgia Railway Company; The South Carolina Railway Company and its Receiver, Daniel H. Chamberlain, and The South Carolina and Georgia Railroad Company, the Purchaser, Assignee, and Successor of the Same, Appellees. } No. 173.

Appeal from the circuit court of the United States for the district of South Carolina.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of South Carolina and was argued by counsel.

On consideration whereof it is now here ordered, adjudged,
145 and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed with costs, and this cause is remanded to the said circuit court of the United States for the district of South Carolina, at Charleston, with instructions to enter a decree herein requiring the appellees and each of them to desist from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them under circumstances and conditions similar to those set out in the petition filed in this cause from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities respectively for the long distance from Memphis aforesaid to Charleston, in the State of South Carolina; that said court will also see that the requirements of said decree are immediately carried into effect and enforced, as provided for in said act to regulate commerce, and will further direct that the appellees pay all costs of this proceed-
146 ing, and in addition thereto such reasonable fee to the appellant's counsel as that court may under the circumstances of this case think proper and just.

It is further ordered that the mandate of this court issue after the expiration of 20 days from the date hereof.

November 6, 1897.

NATHAN GOFF.

Afterwards, at the same term, to wit, on November 10, 1897, Ed. Baxter, Esquire, solicitor for the petitioners (appellees), presented to the court here a petition for a rehearing, which is as follows, to wit:

Petition for Rehearing and Exhibit, Opinion of Supreme Court.

Filed November 10, 1897.

147 [Stamped:] Clerk's office, U. S. circuit court of appeals, fourth circuit. H. T. Meloney, clerk, Richmond.

Petition for Rehearing.

United States Circuit Court of Appeals for the Fourth Circuit.

HENRY W. BEHLMER, Appellant,
vs.
THE LOUISVILLE & NASHVILLE Railroad Company *et al.*, Appellees.

No. 173. Appeal from the Circuit Court of the United States for the District of South Carolina, at Charleston, S. C.

To the honorable the judges of the United States circuit court of appeals for the fourth circuit:

Your petitioners, The Louisville & Nashville Railroad Company, The Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia railroad; The Memphis & Charleston Railroad Company; The East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of said last two mentioned roads; and The Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia & Georgia Railway Company; The South Carolina Railway Company, and its receiver, Daniel H. Chamberlain; and The South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, respectfully show to your honors that this cause came on to be heard in this honorable court on the transcript of the record from the circuit court of the United States for the district of South Carolina; and on consideration whereof it was, on the sixth day of November, 1897, ordered, adjudged and decreed by this court as follows, viz:

"That the decree of the said circuit court in this cause be, and the same is hereby reversed, with costs, and this cause is remanded to the said circuit court of the United States for the district of South Carolina, at Charleston, with instructions to enter a decree herein requiring the appellees and each of them to desist from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried

by them, under circumstances and conditions similar to those
148 set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities, respectively, for the longer distance from Memphis aforesaid to Charleston, in the State of South Carolina. That said court will also see that the requirements of said decree are immediately carried into effect, and enforced as provided for in said act to regulate commerce, and will further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may, under the circumstances of this case, think proper and just.

"It is further ordered that the mandate of this court issue after the expiration of 20 days from the date hereof."

No mandate has yet been issued.

Your petitioners are advised and humbly submit that said order and decree of this court of November 6th, 1897, is erroneous, and the same ought to be reversed; and your petitioners respectfully state the following grounds, viz:

1. It is respectfully submitted that this court erred in reversing said decree of said circuit court in this cause.

2. It is respectfully submitted that this court erred in remanding this cause to said circuit court.

3. It is respectfully submitted that this court erred in instructing said circuit court to enter a decree herein, requiring the appellees and each of them to desist from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities, respectively, for the longer distance from Memphis aforesaid to Charleston, in the State of South Carolina; to see that the requirements of said decree are immediately carried into effect, and enforced as provided for in said act to regulate commerce; and to further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may, under the circumstances of this case, think proper and just.

149 4. It is respectfully submitted that this court erred in not affirming the decree of said circuit court which was reversed by this court.

5. It is respectfully submitted that this court erred because it failed to adjudge and decree that the matters of equity alleged in the bill filed in said circuit court, in this cause, are fully denied in the answer, and are not sustained by the proof, and that said bill be dismissed.

6. It is respectfully submitted that this court erred, because it, in effect, decided that the rates charged by petitioners for the trans-

portation of hay or other commodities carried by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis in the State of Tennessee, to Summerville in the State of South Carolina, are unjust and unreasonable.

7. It is respectfully submitted that this court erred, because it, in effect, decided that the transportation of hay or other commodities carried by petitioners from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, is alike and contemporaneous service rendered under substantially similar circumstances and conditions, with the transportation of hay or other commodities carried by petitioners from Memphis, Tennessee, to Charleston, S. C.

8. It is respectfully submitted that this court erred, because it, in effect, decided that as petitioners make a greater charge in the aggregate on hay or other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., than they make on such freight carried by them from Memphis, Tennessee, to Charleston, S. C., they thereby give to Charleston, S. C., and its traffic an undue or unreasonable preference or advantage, and subject Summerville, S. C., and its traffic to an undue or unreasonable prejudice or disadvantage.

9. It is respectfully submitted that this court erred, because it, in effect, decided that the transportation by petitioners of hay or other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., is transportation conducted under substantially similar circumstances and conditions for a shorter than for a longer distance, over the same line, in the same direction, the shorter being included within the longer distance, as compared with the transportation by petitioners of hay or other commodities, carried by them from Memphis, Tennessee, to Charleston, S. C.

150 10. It is respectfully submitted that this court erred because it in effect decided that the Interstate Commerce Commission has the power to fix the rates of transportation from Memphis, Tennessee, to Summerville, South Carolina, to be charged by petitioners as common carriers subject to the act to regulate commerce.

Petitioners submit herewith a duly certified copy of the opinion of the Supreme Court of the United States in the case of The Interstate Commerce Commission, appellant, *vs.* The Alabama Midland Railway Company *et al.*, appellees, No. 203, October term, 1897, of said court; which opinion was delivered by said court on November 8th, 1897, five days after the opinion in this case was delivered by this court.

Wherefore petitioners respectfully pray that this cause may be reheard before this court; that the issuance of the mandate in this case be suspended until this application can be heard; and that the said order and decree rendered by this court in this cause on November 6th, 1897, may be reversed and that said decree of the circuit court of the United States for the district of South Carolina, rendered in this cause, be affirmed, with costs, and that such other

orders and decrees may be made as to your honors may seem meet and the circumstances of the case may require. As in duty bound your petitioners will ever pray, etc.

ED. BAXTER,
Solicitor for Petitioners.

I, Ed. Baxter, an attorney and solicitor, practicing in United States circuit court of appeals, fourth circuit, do certify that in my opinion, the grounds stated in the above petition for a rehearing are well founded in law and fact, and that this cause is proper to be reheard before your honors, if your honors shall think fit.

ED. BAXTER,
Attorney and Solicitor.

151 Supreme Court of the United States, October Term, 1897.

THE INTERSTATE COMMERCE COMMISSION, Appellant, *vs.* THE ALABAMA MIDLAND RAILWAY COMPANY *et al.* | No. 203. Appeal from the United States Circuit Court of Appeals for the Fifth Circuit.

(November 8, 1897.)

On the 27th day of June, 1892, the Board of Trade of Troy, Alabama, filed a complaint before the Interstate Commerce Commission at Washington, D. C., against the Alabama Midland Railway Company and the Georgia Central Railroad Company and their connections, claiming that in the rates charged for transportation of property by the railroad companies mentioned and their connecting lines there is a discrimination against the town of Troy, in violation of the terms and provisions of the interstate commerce act of Congress of 1887.

The general ground of complaint is, that Troy being in active competition for business with Montgomery, the defendant lines of railway unjustly discriminate in their rates against the former, and give the latter an undue prefe-nce or advantage in respect to certain commodities and classes of traffic. The specific charges insisted on at the hearing, and to which the testimony relates, are:

1. That the Alabama Midland railway and the defendant roads forming lines with it from Baltimore, New York and the East to Troy and Montgomery charge and collect a higher rate of shipments of class goods from those cities to Troy than on such shipments *through Troy* to Montgomery; the latter being the longer-distance point by fifty-two miles.

2. That the Alabama Midland railway and Georgia Central railroad and their connections unjustly discriminate against Troy and in favor of Montgomery in charging and collecting $3.22 per ton to Troy on phosphate rock shipped from the South Carolina and Florida fields and only $3.00 per ton on such shipments to Montgomery, the longer-distant- point by both of said roads; and that all phosphate

rock carried from said fields to Montgomery over the road of the Alabama Midland has to be hauled through Troy.

3. That the rates on cotton, as established by said two roads and their connections, on shipments to the Atlantic seaports, Brunswick, Savannah and Charleston, unjustly discriminate against Troy and in favor of Montgomery, in that the rate per hundred pounds from Troy is forty-seven cents, and that from Montgomery, the longer-distance point, is only forty cents, and that such shipments from Montgomery over the road of the Alabama Midland have to pass through Troy.

4. That on shipments for export from Montgomery and other points, within the so-called "jurisdiction" of the Southern Railway and Steamship Association to the Atlantic seaports, Brunswick, Savannah, Charleston, West Point and Norfolk, a lower rate is charged than the regular published tariff rate to such seaports, and that Montgomery and such other points are allowed by the rules of said association to ship through to Liverpool via any of these seaports at the lowest through rates on the day of shipment, which may be less than the sum of the regular published rail rate and the ocean rate via the port of shipment; that this reduction is taken from the published tariff rail rate to the port of shipment; that, this privilege being denied to Troy, is an unjust discrimination against that
152 town in favor of Montgomery and such other favored cities, and that it is also a discrimination against shipments which terminate at such seaports in favor of shipments for export.

5. That Troy is unjustly discriminated against in being charged on shipments of cotton via Montgomery to New Orleans the full local rate to Montgomery by both the Alabama Midland and Georgia Central.

6. That the rates on "class" goods from western and northwestern points, established by the defendants forming lines from those points to Troy, are relatively unjust and discriminatory as against Troy when compared with the rates over such lines to Montgomery and Columbus.

The commission, having heard this complaint on the evidence theretofore taken, ordered, on the 15th day of August, 1893, the roads participating in the traffic involved in this case "to cease and desist" from charging, demanding, collecting or receiving any greater compensation in the aggregate for services rendered in such transportation than is specified, as follows, to wit:

1. On class goods shipped from Louisville, Kentucky; Saint Louis, Missouri, or Cincinnati, Ohio, to Troy aforesaid, no higher rate of charge than is now charged and collected on such shipments to Columbus, Georgia, and Eufaula, Alabama.

2. On shipments of cotton from Troy aforesaid through Montgomery, Alabama, to New Orleans, Louisiana, no higher rate of charge than fifty cents per hundred pounds.

3. On shipments of cotton from Troy aforesaid for export through the Atlantic seaports, to wit, Brunswick, Savannah, Charleston, West Point or Norfolk, no higher rate of charge to these ports than is

charged and collected on such shipments from Montgomery aforesaid.

4. On shipments of cotton from Troy aforesaid to the ports of Brunswick, Savannah or Charleston, no higher rate of charge than is charged and collected on such shipments from Montgomery aforesaid through Troy to said ports.

5. On shipments of class goods from New York, Baltimore or other northeastern points to Troy aforesaid, no higher rate of charge than is charged and collected on such shipments through Troy to Montgomery aforesaid.

6. On shipments of phosphate rock from South Carolina and Florida fields to Troy aforesaid, no higher rate of charge than is charged and collected on such shipments through Troy to Montgomery aforesaid.

The defendants having failed to heed these orders, the commission thereupon filed this bill of complaint in the circuit court of the United States for the middle district of Alabama, in equity, to compel obedience to the same. On the hearing in said court the bill of complaint was dismissed, and complainant, The Interstate Commerce Commission, appealed the cause to the United States circuit court of appeals for the fifth judicial circuit, at New Orleans, Louisiana. And, thereupon, in said last-named court, on the 2d day of June, 1896, the decree of the said circuit court of the United States for the middle district of Alabama was in all things duly affirmed; and from this judgment and decree the appellant has appealed to this court.

Mr. Justice SHIRAS delivered the opinion of the court:

Several of the assignments of error complain of the action of the circuit court of appeals in not rendering a decree for the enforcement of those portions of the order of the Interstate Commerce Commission which prescribed rates, to be thereafter charged by the defendant companies for services performed in the transportation of goods.

153 Discussion of those assignments is rendered unnecessary by the recent decisions of this court, wherein it has been held, after elaborate argument, that Congress has not conferred upon the Interstate Commerce Commission the legislative power of prescribing rates, either maximum, or minimum, or absolute; and that, as it did not give the express power to the commission, it did not intend to secure the same result indirectly by empowering that tribunal, after having determined what, in reference to the past, were reasonable and just rates, to obtain from the courts a peremptory order that in the future the railroad companies should follow the rates thus determined to have been in the past reasonable and just. (*Cincinnati, New Orleans & Texas Pacific Railway v. Interstate Commerce Commission*, 162 U. S., 184; *Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Railway Company*, 167 U. S., 479.)

Errors are likewise assigned to the action of the court in having failed and refused to affirm and enforce the report and opinion of

the commission, wherein it was found and decided, among other things, that the defendant common carriers which participate in the transportation of class goods to Troy from Louisville, St. Louis and Cincinnati, and from New York, Baltimore and other northeastern points, and the defendant common carriers which participate in the transportation of phosphate rock from South Carolina and Florida to Troy, and the defendant common carriers which participate in the transportation of cotton from Troy to the ports of New Orleans, Brunswick, Savannah, Charleston, West Point or Norfolk, as local shipments or for export, have made greater charges, under substantially similar circumstances and conditions, for the shorter distance to or from Troy than for longer distances over the same lines in the same direction, and have unjustly discriminated in rates against Troy, and subjected said place and dealers and shippers therein to undue and unreasonable prejudice and disadvantage in favor of Montgomery, Eufaula, Columbus and other places and localities and dealers and shippers therein, in violation of the provisions of the act to regulate commerce.

Whether competition between lines of transportation to Montgomery, Eufaula and Columbus justifies the giving to those cities a preference or advantage in rates over Troy, and, if so, whether such a state of facts justifies a departure from equality of rates without authority from the Interstate Commerce Commission under the proviso to the fourth section of the act, are questions of construction of the statute, and are to be determined before we reach the question of fact in this case.

It is contended, in the briefs filed on behalf of the Interstate Commission, that the existence of rival lines of transportation and, consequently, of competition for the traffic, are not facts to be considered by the commission, or by the courts, when determining whether property transported over the same line is carried under "substantially similar circumstances and conditions," as that phrase is found in the fourth section of the act.

Such, evidently, was not the construction put upon this provision of the statute by the commission itself in the present case, for the record discloses that the commission made some allowance for the alleged dissimilarity of circumstances and conditions, arising out of competition and situation, as affecting transportation to Montgomery and Troy respectively, and that, among the errors assigned, is one complaining that the court erred in not holding that the rates prescribed by the commission in its order made due allowance for such dissimilarity.

So, too, in case *In re Louisville & Nashville R. R. Co.* (1 I. C. C. Rep., 77), in discussing the long and short haul clause, it
154 was said by the commission, per Judge Cooley, that "it is impossible to resist the conclusion that in finally rejecting the 'long and short haul clause' of the House bill, which prescribed an inflexible rule, not to be departed from in any case, and retaining in substance the fourth section as it had passed the Senate, both houses understood that they were not adopting a measure of strict prohibition in respect to charging more for the shorter than for the

longer distance, but that they were, instead, leaving the door open for exceptions in certain cases, and, among others, in cases where the circumstances and conditions of the traffic were affected by the element of competition, and where exceptions might be a necessity if the competition was to continue. And water competition was beyond doubt especially in view."

It is, no doubt, true that in a later case, *Railroad Commission of Georgia v. Clyde Steamship Co. et al.* (5 I. C. C. Rep., 327), the commission somewhat modified their holding in the Louisville and Nashville Railroad Company case, just cited, by attempting to restrict the competition, that it is allowable to consider, to the cases of competition with water carriers, competition with foreign railroads, competition with railroad lines wholly in a single State; but the principle that competition in such cases is to be considered is affirmed.

That competition is one of the most obvious and effective circumstances that make the conditions, under which a long and short haul is performed, substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the act to regulate commerce, has been held by many of the circuit courts. It is sufficient to cite a few of the number: *Ex parte Koehler* (31 Fed. Rep., 319); *In re M. P. R'y Co.* (31 Fed. Rep., 862); *I. C. C. v. A., T. & S. F. R. Co.* (50 Fed. Rep., 306); *I. C. C. v. New Orleans & Tex. Pac. R. Co.* (56 Fed. Rep., 943); *Behlmer v. Louisville & Nash. R. Co.* (71 Fed. Rep., 835); *I. C. C. v. Louis. & Nash. R. Co.* (73 Fed. Rep., 409).

In construing statutory provisions, forbidding railway companies from giving any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, the English courts have held, after full consideration, that competition between rival lines is a fact to be considered, and that a preference or advantage thence arising is not necessarily undue or unreasonable. (*Denaby Colliery Company v. Manchester, S. & L. Rw. Co.*, 11 App. Cas., 97; *Phipps v. London & North Western Railway*, 2 Q. B. D., 1892, p. 229.)

But the question whether competition as affecting rates is an element for the commission and the courts to consider in applying the provisions of the act to regulate commerce, is not an open question in this court.

In *Interstate Com. Commission v. B. & O. R. R. Co.* (145 U. S., 263) it was said, approving observations made by Jackson, circuit judge (43 Fed. Rep., 37), that the act to regulate commerce was "not designed to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the road; that it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail; that it is not all discriminations or preferences that fall within the inhibitions of the statute, only such as are unjust or unreasonable;" and, accordingly, it was held that the issue by a railway company,

engaged in interstate commerce, of a "party-rate ticket" for the transportation of ten or more persons from a place situated
155 in one State or Territory to a place situated in another State or Territory, at a rate less than that charged to a single individual for a like transportation on the same trip, does not thereby make "an unjust or unreasonable charge" against such individual within the meaning of the first section of the act to regulate commerce; nor make "an unjust discrimination" against him within the meaning of the second section; nor give "an undue or unreasonable preference or advantage" to the purchasers of the party-rate ticket within the meaning of the third section.

In *Texas and Pac. Railway v. Interstate Com. Com.* (162 U. S., 197) it was held that "in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment; that among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affect rates should be considered, and in deciding whether rates and charges, made at a low rate to secure freights which would otherwise go by other competitive routes, are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered."

To prevent misapprehension, it should be stated that the conclusion to which we are led by these cases, that, in applying the provisions of the third and fourth sections of the act, which make it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, competition which affects rates is one of the matters to be considered, is not applicable to the second section of the act.

As we have shown in the recent case of *Wight v. United States* (167 U. S., 512), the purpose of the second section is to enforce equality between shippers over the same line, and to prohibit any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor, and we there held that the phrase "under substantially similar circumstances

and conditions," as used in the second section, refers to the matter of carriage, and does not include competition between rival routes. This view is not open to the criticism that different meanings are attributed to the same words when found in different sections of the act; for what we hold is that, as the purposes of the several sections are different, the phrase under consideration must be read, in the second section, as restricted to the case of shippers over the same road, thus leaving no room for the operation of competition, but that in the other sections, which cover the entire tract of interstate and foreign commerce, a meaning must be given to the phrase wide enough to include all the facts that have a legitimate bearing on the situation—among which we find the fact of competition when it affects rates.

156 In order further to guard against any misapprehension of the scope of our decision it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such, as having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the commission or the courts from taking that matter into consideration.

It is further contended, on behalf of the appellant, that the courts below erred in holding, in effect, that competition of carrier with carrier, both subject to the act to regulate commerce, will justify a departure from the rule of the fourth section of the act without authority from the Interstate Commerce Commission, under the proviso to that section.

In view of the conclusion hereinbefore reached, the proposition comes to this, that when circumstances and conditions are substantially dissimilar, the railway companies can only avail themselves of such a situation by an application to the commission.

The language of the proviso is as follows:

"That upon application to the commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the commission, be authorized to charge less for longer than shorter distances for the transportation of persons or property, and the commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

The claim now made for the commission is that the only body which has the power to relieve railroad companies from the operation of the long and short haul clause on the account of the existence of competition, or any other similar element which would make its application unfair, is the commission itself, which is bound to con-

sider the question, upon application by the railroad company, but whose decision is discretionary and unreviewable.

The first observation that occurs on this proposition is that there appears to be no allegation in the bill or petition raising such an issue. The gravamen of the complaint is that the defendant companies have continued to charge and collect a greater compensation for services rendered in transportation of property than is prescribed in the order of the commission. It was not claimed that the defendants were precluded from showing in the courts that the difference of rates complained of was justified by dissimilarity of circumstances and conditions by reason of not having applied to the commission to be relieved from the operation of the fourth section.

Moreover, this view of the scope of the proviso to the fourth section does not appear to have ever been acted upon or enforced by the commission. On the contrary, in the case of *In re Louisville & Nashville R. R. Company v. Interstate Com. Com.* (1 I. C. C. Rep., 57) the commission, through Judge Cooley, said, in speaking of the effect of the introduction into the fourth section of the words "under substantially similar circumstances and conditions," and of the meaning of the proviso: "That which the act does not declare unlawful must remain lawful if it was so before, and that which it fails to forbid, the carrier is left at liberty to do, without permission of any one. * * * The charging or receiving the greater
157 compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated. * * * Beyond question, the carrier must judge for itself what are the 'substantially similar circumstances and conditions' which preclude the special rate, rebate or drawback, which is made unlawful by the second section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of the consequences; but the special rate, rebate or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it; and as Congress clearly intended this, it must also, when using the same words in the fourth section, have intended that the carrier, whose privilege was in the same way limited by them, should in the same way act upon its judgment of the limiting circumstances and conditions."

The view thus expressed has been adopted in several of the circuit courts; *I. C. C. v. A., T. & S. F. R. R. Co.* (50 Fed. Rep., 300); *I. C. C. v. Cin., New Or. & Tex. Pac. R'y Co.* (56 Fed. Rep., 942); *Behlmer v. Louis. & Nash. R. Co.* (71 Fed. Rep., 839); and we do not think the courts below erred in following it in the present case. We are unable to suppose that Congress intended, by the fourth section and the proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissim-

ilar, from making different rates until and unless the commission shall authorize them so to do, much less do we think that it was the intention of Congress that the decision of the commission, if applied to, could not be reviewed by the courts. The provisions of section 16 of the act, which authorize the court to "proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises, and to this end, such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition," extend as well to an inquiry or proceeding under the fourth section as to those arising under the other sections of the act.

Upon these conclusions, that competition between rival routes is one of the matters which may lawfully be considered in making rates, and that substantial dissimilarity of circumstances and conditions may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line, we are brought to consider whether, upon the evidence in the present case, the courts below erred in dismissing the Interstate Commerce Commission's complaint.

As the third section of the act, which forbids the making or giving any undue or unreasonable preference or advantage to any particular person or locality, does not define what, under that section, shall constitute a preference or advantage to be undue or unreasonable, and as the fourth section, which forbids the charging or receiving greater compensation in the aggregate for the transportation of like kinds of property for a shorter than for a longer distance over the same line, under substantially similar circumstances and conditions, does not define or describe in what the similarity
158 or dissimilarity of circumstances and conditions shall consist, it cannot be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact depending on the matters proved in each case. (*Denaby Main Colliery Company v. Manchester Railway Co.*, 3 Railway & Canal Traffic Cases, 426; *Phipps v. London & North Western Railway*, 1892, 2 Q. B. D., 229; *Cincinnati, N. O. & Tex. Pac. R. W. v. Interstate Com. Com.*, 162 U. S., 184, 194; *Texas and Pacific Railway v. Interstate Com. Com.*, 162 U. S., 197, 235.)

The circuit court, after a consideration of the evidence, expressed its conclusion thus:

"In any aspect of the case it seems impossible to consider this complaint of the board of trade of Troy against the defendant railroad companies, particularly the Midland and Georgia Central railroads, in the matter of the charges upon property transported on their roads to or from points east or west of Troy, as specified and complained of, obnoxious to the fourth or any other section of the

interstate commerce act. The conditions are not substantially the same and the circumstances are dissimilar, so that the case is not within the statute. The case made here is not the case as it was made before the commission. New testimony has been taken, and the conclusion reached is that the bill is not sustained; that it should be dismissed, and it is so ordered" (69 Fed. Rep., 227).

The circuit court of appeals, in affirming the decree of the circuit court, used the following language:

"Only two railroads, the Alabama Midland and the Georgia Central, reach Troy. Each of these roads has connection with other lines, parties hereto, reaching all the long-distance markets mentioned in these proceedings. The commission finds that no departure from the long and short haul rule of the fourth section of the statute, as against Troy as the shorter-distance point and in favor of Montgomery as the longer-distance point, appears to be chargeable to the Georgia Central. The rates in question when separately considered are not unreasonable or unjust. As a matter of business necessity they are the same by each of the railroads that reach Troy. The commission concludes that as related to the rates to Montgomery, Columbus and Eufaula, the rates to and from Troy unjustly discriminate against Troy, and in the case of the Alabama Midland violate the long and short haul rule.

"The volume of population and of business at Montgomery is many times larger than it is at Troy. There are many more railway lines running to and through Montgomery connecting with all the distant markets. The Alabama river, open all the year, is capable, if need be, of bearing to Mobile, on the sea, the burden of all the goods of every class that pass to or from Montgomery. The competition of the railway lines is not stifled, but is fully recognized, intelligently and honestly controlled and regulated by the traffic association in its schedule of rates. There is no suggestion in the evidence that the traffic managers who represent the carriers that are members of that associations are incompetent or under the bias of any personal preference for Montgomery or prejudice against Troy that has led them, or is likely to lead them, to unjustly discriminate against Troy. When the rates to Montgomery were higher a few years ago than now, actual active water-line competition by the river came in, and the rates were reduced to the level of the lowest practical paying water rates, and the volume of carriage by the river is now comparatively small, but the controlling power of that water line remains in full force, and must ever remain in force as long as the river remains navigable to its present capacity. And this water line affects to a degree less or more all the shipments to or from Montgomery from or to all the long-distance markets. It would not take cotton from Montgomery to the South Atlantic ports for export, but it would take the cotton to the points of its ultimate destination if the railroad rates to foreign marts through the Atlantic ports were not kept down to or below the level of profitable carriage by water from
159 Montgomery through the port of Mobile. The volume of trade to be competed for, the number of carriers actually

competing for it, a constantly open river present to take a large part of it whenever the railroad rates rise up to the mark of profitable water carriage, seem to us, as they did to the circuit court, to constitute circumstances and conditions at Montgomery substantially dissimilar from those existing at Troy, and to relieve the carriers from the charges preferred against them by its board of trade. We do not discuss the third and fourth contention of the counsel for the appellant further than to say that, within the limits of the exercise of intelligent good faith in the conduct of their business, and subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to traffic or persons similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits. The carriers are better qualified to adjust such matters than any court or board of public administration, and, within the limitations suggested, it is safe and wise to leave to their traffic managers the adjusting of dissimilar circumstances and conditions to their business." (21 U. S. Ct. Ct. of App. Rep., 51.)

The last sentence in this extract is objected to by the commission's counsel, as declaring that the determination of the extent to which discrimination is justified by circumstances and conditions should be left to the carriers. If so read, we should not be ready to adopt or approve such a position. But we understand the statement, read in the connection in *in* which it occurs, to mean only that, when once a substantial dissimilarity of circumstances and conditions has been made to appear, the carriers are, from the nature of the question, better fitted to adjust their rates to suit such dissimilarity of circumstances and conditions than courts or commissions; and when we consider the difficulty, the practical impossibility, of a court or a commission taking into view the various and continually changing facts that bear upon the question, and intelligently regulating rates and charges accordingly, the observation objected to is manifestly just. But it does not mean that the action of the carriers, in fixing and adjusting the rates, in such instances, is not subject to revision by the commission and the courts, when it is charged that such action has resulted in rates unjust or unreasonable, or in unjust discriminations and preferences. And such charges were made in the present case, and were considered, in the first place by the commission and afterwards by the circuit court and by the circuit court of appeals.

The first contention we encounter, upon this branch of the case, is that the circuit court had no jurisdiction to review the judgment of the commission upon this question of fact; that the court is only authorized to inquire whether or not the commission has miscon-

strued the statute and thereby exceeded its power; that there is no general jurisdiction to take evidence upon the merits of the original controversy; and, especially, that questions under the third section are questions of fact and not of power, and hence unreviewable.

We think this contention is sufficiently answered by simply referring to those portions of the act which provide that, when the court is invoked by the commission to enforce its lawful orders or requirements, the court shall proceed, as a court of equity, to hear and determine the matter and in such manner as to do justice in the premises.

160 In the case of *Cincinnati, N. O. and Texas Pacific R. W. Co. v. I. C. Com.* (162 U. S., 184) the findings of the commission were overruled by the circuit court, after additional evidence taken in the court, and the decision of the circuit court was reviewed in the light of the evidence and reversed by the circuit court of appeals, and this court, in reference to the argument that the commission had not given due weight to the facts that tended to show that the circumstances and conditions were so dissimilar as to justify the rates charged, held that as the question was one of fact, peculiarly within the province of the commission, and as its conclusions had been accepted and approved by the circuit court of appeals, and as this court found nothing in the record that made it our duty to draw a different conclusion, the decree of the circuit court of appeals should be affirmed. Such a holding clearly implies that there was power in the courts below to consider and apply the evidence and in this court to review their decisions.

So in the case of *Texas and Pacific Railway Company v. Interstate Com. Com.* (162 U. S., 197) the decision of the circuit court of appeals, which affirmed the validity of the order of the commission, upon the ground that, even if ocean competition should be regarded as creating a dissimilar condition, yet that, in the case under consideration, the disparity in rates was too great to be justified by that condition, was reversed by this court, not because the circuit court had no jurisdiction to consider the evidence and thereupon to affirm the validity of the order of the commission, but because that issue was not actually before the court, and that no testimony had been adduced by either party on such an issue; and it was said that the language of the act authorizing the court to hear and determine the matter as a case of equity, "necessarily implies that the court is not concluded by the findings or conclusions of the commission."

Accordingly our conclusion is that it was competent, in the present case, for the circuit court, in dealing with the issues raised by the petition of the commission and the answers thereto, and for the circuit court of appeals on the appeal, to determine the case upon a consideration of the allegations of the parties and of the evidence adduced in their support, giving effect, however, to the findings of fact in the report of the commission as *prima facie* evidence of the matters therein stated.

It has been uniformly held by the several circuit courts and the circuit courts of appeal, in such cases, that they are not restricted to the evidence adduced before the commission, nor to a consideration

merely of the power of the commission to make the particular order under question, but that additional evidence may be put in by either party, and that the duty of the court is to decide, as a court of equity, upon the entire body of evidence.

Coming at last to the questions of fact in this case, we encounter a large amount of conflicting evidence. It seems undeniable, as the effect of the evidence on both sides, that an actual dissimilarity of circumstances and conditions exists between the cities concerned, both as respects the volume of their respective trade and the competition, affecting rates, occasioned by rival routes by land and water. Indeed, the commission itself recognized such a state of facts by making an allowance in the rates prescribed, for dissimilarity resulting from competition, and it was contended on behalf of the commission, both in the courts below and in this court, that the competition did not justify the discriminations against Troy to the *extent* shown, and that the allowance made therefor by the commission was a *due* allowance.

161 The issue is thus restricted to the question of the preponderance of the evidence on the respective sides of the controversy. We have read the evidence disclosed by the record, and have endeavored to weigh it with the aid of able and elaborate discussions by the respective counsel.

No useful purpose would be served by an attempt to formally state and analyze the evidence, but the result is that we are not convinced that the courts below erred in their estimate of the evidence, and that we perceive no error in the principles of law on which they proceeded in the application of the evidence.

The decree of the circuit court of appeals is accordingly *affirmed*.

True copy.
Test:

[Seal of Court.]

JAMES H. McKENNEY,
Clerk Supreme Court U. S.

162 Whereupon the court made and entered the following order, to wit:

Order Suspending Mandate.

Filed November 11, 1897.

U. S. Circuit Court of Appeals for the Fourth Circuit.

HENRY W. BEHLMER, Appellant,
vs.
THE LOUISVILLE & NASHVILLE RAILroad Company *et al.*, Appellees.

No. 173. Appeal from the Circuit Court of the United States for the District of South Carolina.

The appellees having this day tendered their petition for a rehearing of this cause, asking that the decree rendered by this court in the same, of November 6, 1897, be reversed, and that such other order or decree be entered herein as under the circumstances may

be proper; it is hereby ordered that said petition be filed, and that, pending its consideration by the court, the issuance of the mandate in this case be suspended.

Nov. 11, 1897.

NATHAN GOFF,
Senior Circuit Judge, Presiding.

163 Afterwards, at the same term, to wit, November 24, 1897, the court made and entered the following order, to wit:

Order Denying Rehearing and Withholding Mandate.

Filed November 24, 1897.

United States Circuit Court of Appeal-, Fourth Circuit.

HENRY W. BEHLMER, Appellant, *vs.* LOUISVILLE AND NASHVILLE Railroad Company *et al.*, Appellees.	No. 173. Appeal from the Circuit Court of the United States for the District of South Carolina.

This cause having been decided at this term in favor of the appellant, and the appellees, by Ed. Baxter, attorney, having presented to the court, on the 10th day of November, 1897, a petition for a rehearing of the cause—

It is now here ordered and adjudged by this court that the rehearing asked for be, and the same is hereby, refused.

It is further ordered that the mandate of this court to the
164 court below be withheld until the 20th day of January, 1898.

NATHAN GOFF.

November 24, 1897.

Afterwards, at the same term, to wit, on January 17, 1898, the said appellees, by their solicitor, prayed an appeal to the Supreme Court of the United States and filed therewith their assignment of errors and appeal bond, which are as follows, to wit:

Prayer of Appeal to the Supreme Court.

Filed January 17, 1898.

In United States Circuit Court of Appeals for the Fourth Circuit.

HENRY W. BEHLMER, Appellant, *vs.* THE LOUISVILLE & NASHVILLE RAILROAD COMPANY *et al.*, Appellees.	No. 173.

Petition for appeal.

Said appellees, The Louisville & Nashville Railroad Company and The Central Railroad & Banking Company of Georgia
164½ and H. M. Comer, its receiver, as lessees of the Georgia railroad; The Memphis & Charleston Railroad Company, The

East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of the two last-mentioned roads, and The South- Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia & Georgia Railway Company, and The South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and The South Carolina & Georgia Railroad Company, the purchaser, assignee, and successor of the same, conceiving themselves aggrieved by the decree entered in this cause in said United States circuit court of appeals on the sixth day of November, 1897, do hereby appeal from said decision to the Supreme Court of the United States, and they pray that their said appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

January 17, 1898.

JOS. W. BARNWELL,
Solicitor for S. C. & Ga. R. R.
ED. BAXTER,
Solicitor for Appellees as of Record.

165 *Assignment of Errors.*

Filed January 17, 1898.

In the United States Circuit Court of Appeals for the Fourth Circuit.

HENRY W. BEHLMER, Appellant,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY *et al.*, Appellees. } No. 173.

On the 17th day of January, in the year of our Lord eighteen hundred and ninety-eight, came the said appellees, The Louisville and Nashville Railroad Company and The Central Railroad and Banking Company of Georgia and H. Comer, its receiver, as lessees of the Georgia railroad; The Memphis & Charleston Railroad Company, The East Tennessee, Virginia and Georgia Railway Company, Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of the last two mentioned roads, and The Southern Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia and Georgia Railway Company, and The
166 South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and The South Carolina & Georgia Railroad Company, the purchaser, assignee, and successor of the same, by Ed. Baxter and Joseph W. Barnwell, their solicitors, and say that in the decree rendered by said circuit court of appeals in the above-entitled cause on the sixth day of November, 1897, and in the record and proceedings in said cause in said court there is manifest error, in this, to wit:

I.

That said circuit court of appeals erred in reversing and remanding the decree rendered in the above-entitled cause on January 22nd, 1896, by the circuit court of the United States for the district of South Carolina.

II.

That said circuit court of appeals erred in instructing said circuit court to enter a decree herein requiring the appellees and each of them to desist from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay or other commodities carried by them under circum-
167 stances and conditions similar to those set out in the petition filed in this cause from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities respectively for the longer distance from Memphis aforesaid to Charleston, in the State of South Carolina; to see that the requirements of said decree are immediately carried into effect and enforced, as provided for in said act to regulate commerce, and to further direct that the appellees pay all costs of this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that court may under the circumstances of this case think proper and just.

III.

That said circuit court of appeals erred in decreeing that said appellees should pay the costs of said cause in said circuit court of appeals.

IV.

That said circuit court of appeals erred in not affirming
168 said decree rendered in said cause January 22nd, 1896, by said circuit court of the United States for the district of South Carolina.

V.

That said circuit court of appeals erred because it failed to adjudge and decree that the matters of equity alleged in the bill filed in the above-entitled cause are fully denied in the answers and are not sustained by the proof, and that said bill be dismissed.

VI.

That said circuit court of appeals erred because it in effect decided that the rates charged by the above-named appellees for the transportation of hay and other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., are unjust and unreasonable.

VII.

That said circuit court of appeals erred because it in effect decided that the transportation of hay and other commodities carried

by the above-named appellees from Memphis, Tennessee, to Summerville, S. C., is a like contemporaneous service, under substantially similar circumstances and conditions, with the transportation of hay and other commodities carried by the above-named appellees from Memphis, Tennessee, to Charleston, S. C.

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VIII.

That said circuit court of appeals erred because it in effect decided that as the above-named appellees make a greater charge in the aggregate on hay and other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., than they make on such freight from Memphis, Tennessee, to Charleston, S. C., they thereby give to Charleston, S. C., and its traffic an undue or unreasonable preference or advantage, and subject Summerville, S. C., and its traffic to an undue or unreasonable prejudice or disadvantage.

IX.

That said circuit court of appeals erred because it in effect decided that the transportation by the above-named appellees of hay and other commodities carried by them from Memphis, Tennessee, to Summerville, S. C., is transportation conducted under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, as compared with the transportation by the above-named appellees of hay and other commodities carried by them from Memphis, Tennessee, to Charleston, S. C.

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X.

That said circuit court of appeals erred because it in effect decided that the Interstate Commerce Commission has the power to fix the rates of transportation to be charged by the above-mentioned appellees for carrying freight from Memphis, Tennessee, to Summerville, S. C.

XI.

That the said circuit court of appeals erred in directing that a counsel fee should be paid to the counsel of appellant in said court, and in not deciding that the act known as the interstate commerce act, in so far as it directs the payment of a counsel fee to the successful party complaining against railroad corporations engaged as carriers of interstate commerce, while it provides for no similar counsel fee to such railroad companies in case judgment be in their favor, is unconstitutional and void, inasmuch as it deprives such railroad companies of their property without due process of law.

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XII.

That said circuit court of appeals erred in not sustaining the decree of the circuit court dismissing the petition of appellant as against The South Carolina & Georgia Railroad Company, appellee,

on the ground that the said company was not served with the order of the commission requiring said company to desist from charging any greater compensation in the aggregate for transportation of hay or other commodities from Memphis to Summerville than that contemporaneously charged and received from Memphis to Charleston.

XIII.

That said circuit court of appeals erred in deciding that there was any proof whatever of the service of a copy of the order of the Interstate Commerce Commission made in said cause upon the appellee, The South Carolina & Georgia Railroad Company, and in not deciding that it was beyond the power of the circuit court, after dismissing the petition of appellant, to alter, correct, or amend
172 said decree after the term had expired in which the decree dismissing said petition was filed.

XIV.

That said circuit court of appeals erred in reversing the decree of the circuit court, which found that the appellee The South Carolina & Georgia Railroad Company was not bound by the proceedings before the Interstate Commerce Commission brought against D. H. Chamberlain, receiver of the South Carolina Railway Company, unless proof was made of the service upon said appellant of a copy of the order of said Interstate Commerce Commission, and in deciding that the purchase at a foreclosure sale of the property of the South Carolina Railway Company by a committee of its mortgage bondholders and the conveyance of said property to a new corporation, the South Carolina & Georgia Railroad Company, was a mere change of name.

Wherefore the above-named appellees, The Louisville and Nashville Railroad Company, The Central Railroad and Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia railroad; The Memphis & Charleston Railroad Com-
173 pany, The East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of said last two mentioned roads, and The Southern Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia & Georgia Railway Company; The South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and The South Carolina & Georgia Railroad Company, the purchaser, assignee, and successor of the same, pray that the said decree of said United States circuit court of appeals for the fourth circuit, rendered November 6th, 1897, be reversed, and that said court be ordered to enter a decree affirming the said decree rendered on the said 22nd day of January, 1896, in the above-entitled cause by the said circuit court of the United States for the district of South Carolina.

ED. BAXTER,
Solicitor for said Appellees as of Record.
JOS. W. BARNWELL,
Solicitor for the South Carolina & Georgia Railroad Company.

174 *Appeal Bond.*

Filed January 17, 1898.

In United States Circuit Court of Appeals for the Fourth Circuit.

HENRY W. BEHLMER, Appellant,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY *et al.*, Appellees. } No. 173.

Know all men by these presents that we, the Louisville & Nashville Railroad Company, the Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia railroad; the Memphis & Charleston Railroad Company, the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of said last two mentioned roads, and the Southern Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia & Georgia Railway Company; the South Carolina Railway
175 Company and its receiver, Daniel H. Chamberlain, and the South Carolina & Georgia Railroad Company, the purchaser, assignee, and successor of the same, as principals, and Ed. Baxter, as surety, are held and firmly bound unto the above-named Henry W. Behlmer in the sum of two thousand dollars, to be paid to the said Henry W. Behlmer; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 17th day of January, in the year of our Lord eighteen hundred and ninety-eight.

Whereas the above-named The Louisville & Nashville Railroad Company, The Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia railroad; The Memphis & Charleston Railroad Company, The East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of said last two mentioned roads, and The Southern Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia & Georgia
176 Railway Company; The South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and The South Carolina & Georgia Railroad Company, the purchaser, assignee, and successor of the same, have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the United States circuit court of appeals for the fourth circuit on the sixth day of November, 1897:

Now, therefore, the condition of this obligation is such that if the above-named Louisville & Nashville Railroad Company, the Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia railroad; the Memphis & Charleston Railroad Company, the East Tennessee, Virginia &

Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of said last two mentioned roads, and the Southern Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia & Georgia Railway Company; the South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and the South Carolina & Georgia Railroad Company, the purchaser, assignee, and successor
177 of the same, shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, [SEAL.]
By ED. BAXTER, *Its Solicitor and Attorney-in-fact.*
THE CENTRAL RAILROAD & BANKING COMPANY *COMPANY* OF GEORGIA. [SEAL.]
By ED. BAXTER, *Its Solicitor and Attorney-in-fact.*
H. M. COMER, *Receiver,* [SEAL.]
By ED. BAXTER, *His Solicitor and Attorney-in-fact.*
THE MEMPHIS & CHARLESTON RAILROAD COMPANY, [SEAL.]
By ED. BAXTER, *Its Solicitor and Attorney-in-fact.*
THE EAST TENNESSEE, VIRGINIA & GEORGIA RAILWAY COMPANY, [SEAL.]
By ED. BAXTER, *Its Solicitor and Attorney-in-fact.*
SAMUEL SPENCER, *Receiver,* [SEAL.]
By ED. BAXTER, *His Solicitor and Attorney-in-fact.*
HENRY FINK, *Receiver,* [SEAL.]
By ED. BAXTER, *His Solicitor and Attorney-in-fact.*
178 CHAS. M. McGHEE, *Receiver,* [SEAL.]
By ED. BAXTER, *His Solicitor and Attorney-in-fact.*
THE SOUTHERN RAILWAY COMPANY, [SEAL.]
By ED. BAXTER, *Its Solicitor and Attorney-in-fact.*
THE SOUTH CAROLINA RAILWAY COMPANY, [SEAL.]
By ED. BAXTER, *Its Solicitor and Attorney-in-fact.*
DANIEL H. CHAMBERLAIN, *Receiver,* [SEAL.]
By ED. BAXTER, *His Solicitor and Attorney-in-fact.*
THE SOUTH CAROLINA & GEORGIA RAILROAD COMPANY, [SEAL.]
By JOS. W. BARNWELL,
Its Solicitor and Attorney-in-fact.
ED. BAXTER, *Surety.* [SEAL.]

Sealed and delivered and taken and acknowledged before me and approved by me this 17th day of January, eighteen hundred and ninety-eight.

NATHAN GOFF, *Judge.*

Thereupon, on the same day, the court here made and entered the following order, to wit:

Order Granting Appeal.

Filed January 17, 1898.

179 In the United States Circuit Court of Appeals for the Fourth Circuit.

HENRY W. BEHLMER, Appellant,
vs.
THE LOUISVILLE & NASHVILLE RAILROAD COMPANY *et al.*, Appellees. } No. 173.

Said appellees, The Louisville & Nashville Railroad Company, The Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia railroad; The Memphis & Charleston Railroad Company, The East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of the said last two mentioned roads, and The Southern Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia & Georgia Railway Company; The South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and The South Carolina & Georgia Railroad Company, the purchaser, assignee, and successor of the same, pray an appeal from the decree rendered by this court in the above-entitled cause on November sixth, 1897, to the Supreme Court of the
180 United States; and said appellees having filed with the clerk of this court their petition for appeal, together with an assignment of errors and an appeal bond, which bond has been duly approved, it is ordered, adjudged, and decreed by the court that said appeal be granted and allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, be sent to the Supreme Court of the United States.

January 17, 1898.

NATHAN GOFF.

181 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

To Henry W. Behlmer, Greeting:

You are hereby cited and admonished to be and appear at the court-room of the Supreme Court of the United States, at Washington, on the 14th day of March, eighteen hundred and ninety-eight, pursuant to an appeal allowed and granted by the United States circuit court of appeals for the fourth circuit in the case of Henry W. Behlmer, appellant, *vs.* The Louisville & Nashville Railroad Company, The Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia railroad; The Memphis & Charleston Railroad Company, The East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of said last two mentioned roads, and The Southern Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia &

Georgia Railway Company; The South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and The South Carolina & Georgia Railroad Company, the purchaser, assignee, and successor of the same, as appellees, to show cause, if any there be, why the decree of said court of appeals rendered November 6th, 1897, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of January, in the year of our Lord eighteen hundred and ninety-eight.

NATHAN GOFF, *Judge.*

This citation may be served by the marshal of the district where the said Henry W. Behlmer or his solicitor of record in the above cause may be found.

NATHAN GOFF, *Judge.*

182 Service of a copy of the above citation is hereby acknowledged this 20th day of January, 1898.

CLAUDIAN B. NORTHROP,
Solicitor for said Henry W. Behlmer.

[Endorsed:] 173. Acceptance of service of citation.

183 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

To Henry W. Behlmer, Greeting:

You are hereby cited and admonished to be and appear at the court-room of the Supreme Court of the United States, at Washington, on the 14th day of March, eighteen hundred and ninety-eight, pursuant to an appeal allowed and granted by the United States circuit court of appeals for the fourth circuit in the case of Henry W. Behlmer, appellant, *vs.* The Louisville & Nashville Railroad Company, The Central Railroad & Banking Company of Georgia, and H. M. Comer, its receiver, as lessees of the Georgia railroad; The Memphis & Charleston Railroad Company, The East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Chas. M. McGhee, as receivers of said last two mentioned roads, and The Southern Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia & Georgia Railway Company; The South Carolina Railway Company and its receiver, Daniel H. Chamberlain, and The South Carolina & Georgia Railroad Company, the purchaser, assignee, and successor of the same, as appellees, to show cause, if any there be, why the decree of said court of appeals rendered November 6th, 1897, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 17th day of January, in the year of our Lord eighteen hundred and ninety-eight.

NATHAN GOFF, *Judge.*

This citation may be served by the marshal of the district where the said Henry W. Behlmer or his solicitor of record in the above cause may be found.

NATHAN GOFF, *Judge.*

184 Service of a copy of the above citation is hereby acknowledged this — day of ——, 1898.

——— ———,
Solicitor for said Henry W. Behlmer.

[Endorsed:] Entered in civil docket, fol. 39, this Jan'y 20, 1898. J. P. Hunter, U. S. marshal. Marshal's docket No. 154.

Personally comes James S. Simons, ch'f office deputy marshal, who, being duly sworn, deposes and says that he served a copy of the within citation on Henry W. Behlmer (personally), at Summerville, So. Ca., on 20 January, 1898.

J. S. SIMONS,
Ch'f Office Dept. Marshal.

Sworn to before me Jan'y 25, 1898.
[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. HAGOOD,
C. C. C. U. S.

185 And thereupon it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the Supreme Court of the United States, and the same is transmitted accordingly.

Test: HENRY T. MELONEY, *Clerk.*

UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the aforegoing is a true transcript of the record and proceedings in the therein-entitled cause, as the same remains upon the records and files of the said circuit court of appeals.

Seal United States Circuit Court of Appeals, Fourth Circuit.

In testimony whereof I hereto set my hand and affix the seal of the said United States circuit court of appeals for the fourth circuit, at Richmond, on this 31st day of January, A. D. 1898.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Ct.

Endorsed on cover: Case No. 16,798. U. S. C. C. of appeals, 4th circuit. Term No., 244. The Louisville and Nashville Railroad Company *et al.*, appellants, *vs.* Henry W. Behlmer. Filed February 17th, 1898.